RECORD AND BRIEFS

Supreme Court, U.S.
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No. 16-299

In the Supreme Court of the United States

NATIONAL ASSOCIATION OF MANUFACTURERS,

Petitioner,

v.

U.S. DEPARTMENT OF DEFENSE,
DEPARTMENT OF THE ARMY CORPS OF ENGINEERS, AND
U.S. ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In June 2015, respondent agencies promulgated a final rule defining the term "the waters of the United States" and hence the scope of Clean Water Act jurisdiction. The National Association of Manufacturers challenged that rule in district court under the Administrative Procedure Act. State, municipal, industry, and environmental challengers likewise filed APA suits, but in addition filed protective petitions for review in the courts of appeals, citing uncertainty about whether the rule challenge falls under the CWA's judicial review provision, 33 U.S.C. § 1369(b)(1).

The petitions for review were consolidated in the Sixth Circuit. The NAM intervened as respondent in the Sixth Circuit and moved to dismiss the petitions for want of jurisdiction. After full briefing and argument, the Sixth Circuit held that it, not the district courts, has jurisdiction to decide challenges to the rule. But only one judge actually believed that to be the correct outcome. Although two panel members concluded that § 1369(b)(1) *precludes* jurisdiction, one of them reasoned that he was bound by "incorrect" circuit precedent to take jurisdiction under § 1369(b)(1)(F), which requires that agency actions "in issuing or denying any permit under" § 1342 be reviewed by the court of appeals.

This recurring jurisdictional issue has divided the circuits, wasted judicial and party resources, and delayed the resolution of important rule challenges.

The question presented is whether the Sixth Circuit erred when it held that it has jurisdiction under 33 U.S.C. § 1369(b)(1)(F) to decide petitions to review the waters of the United States rule, even though the rule does not "issu[e] or den[y] any permit" but instead defines the waters that fall within Clean Water Act jurisdiction.

PARTIES TO THE PROCEEDINGS BELOW

After the Judicial Panel on Multidistrict Litigation consolidated the petitions for review in the Sixth Circuit (Consolidation Order, Dkt. No. 3, MCP No. 135 (JPML July 28, 2015)), the Sixth Circuit permitted petitioner here, the National Association of Manufacturers, to intervene as a respondent. Order, No. 15-3751 cons. (Sept. 16, 2015).

Respondents below—the federal agency respondents here—are the U.S. Environmental Protection Agency; Regina McCarthy, in her official capacity as EPA administrator; the U.S. Army Corps of Engineers; Lieutenant General Todd T. Semonite, in his official capacity as the Corps' Chief of Engineers and Commanding General;[1] Jo-Ellen Darcy, in her official capacity as Assistant Secretary of the Army; and Eric Fanning, in his official capacity as Secretary of the Army.[2]

State intervenor-respondents below and respondents here are the States of New York, Connecticut, Hawaii, Massachusetts, Oregon, Vermont, Washington, and the District of Columbia.

Over 100 other parties filed 22 petitions for review below, and intervened in other petitions, and many of those petitioners moved to dismiss their own and other petitions for review for want of jurisdiction. These petitioners below, respondents here, are as follows:

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[1] Lt. General Semonite succeeded Lt. General Thomas P. Bostick in this capacity on May 19, 2016.

[2] Secretary Fanning succeeded John M. McHugh in this capacity on May 17, 2016.

No. 15-3751: Murray Energy Corporation.

No. 15-3799: States of Ohio, Michigan, and Tennessee.

No. 15-3817: National Wildlife Federation.

No. 15-3820: Natural Resources Defense Council, Inc.

No. 15-3822: State of Oklahoma.

No. 15-3823: Chamber of Commerce of the United States; National Federation of Independent Business; State Chamber of Oklahoma; Tulsa Regional Chamber; and Portland Cement Association.

No. 15-3831: States of North Dakota, Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, South Dakota, Wyoming, New Mexico Environment Department, New Mexico State Engineer.

No. 15-3837: Waterkeeper Alliance; Center for Biological Diversity; Center for Food Safety; Humboldt Baykeeper; Russian Riverkeeper; Monterey Coastkeeper; Upper Missouri Waterkeeper, Inc.; Snake River Waterkeeper, Inc.; Turtle Island Restoration Network, Inc.

No. 15-3839: Puget SoundKeeper; Sierra Club.

No. 15-3850: American Farm Bureau Federation; American Forest & Paper Association; American Petroleum Institute; American Road and Transportation Builders Association; Greater Houston Builders Association; Leading Builders of America; Matagorda County Farm Bureau; National Alliance of Forest Owners; National Association of Home Builders; National Association of Realtors; National Cattlemen's Beef Association; National Corn Growers Association; National Mining Association; National Pork Producers Council; National Stone, Sand, and Gravel Association;

Public Lands Council; Texas Farm Bureau; and U.S. Poultry & Egg Association.

No. 15-3853: States of Texas, Louisiana, and Mississippi; Texas Department of Agriculture; Texas Commission on Environmental Quality; Texas Department of Transportation; Texas General Land Office; Railroad Commission of Texas; Texas Water Development Board.

No. 15-3858: Utility Water Act Group.

No. 15-3885: Southeastern Legal Foundation, Inc.; Georgia Agribusiness Council, Inc.; Greater Atlanta Homebuilders Association, Inc.

No. 15-3887: States of Georgia, West Virginia, Alabama, Florida, Indiana, Kansas; Commonwealth of Kentucky; North Carolina Department of Environment and Natural Resources; States of South Carolina, Utah, and Wisconsin.

No. 15-3948: One Hundred Miles; South Carolina Coastal Conservation League.

No. 15-4159: Southeast Stormwater Association, Inc.; Florida Stormwater Association, Inc.; Florida Rural Water Association, Inc., and Florida League of Cities, Inc.

No. 15-4162: Michigan Farm Bureau.

No. 15-4188: Washington Cattlemen's Association; California Cattlemen's Association; Oregon Cattlemen's Association; New Mexico Cattle Growers Association; New Mexico Wool Growers, Inc.; New Mexico Federal Lands Council; Coalition of Arizona/New Mexico Counties for Stable Economic Growth; Duarte Nursery, Inc.; Pierce Investment Company; LPF Properties, LLC; Hawkes Company, Inc.

No. 15-4211: Association of American Railroads; Port Terminal Railroad Association.

No. 15-4234: Texas Alliance for Responsible Growth, Environment and Transportation.

No. 15-4305: American Exploration & Mining Association.

No. 15-4404: Arizona Mining Association; Arizona Farm Bureau; Association of Commerce and Industry; New Mexico Mining Association; Arizona Chamber of Commerce & Industry; Arizona Rock Products Association; and New Mexico Farm & Livestock Bureau.

CORPORATE DISCLOSURE STATEMENT

Petitioner National Association of Manufacturers is a not-for-profit public advocacy group. It has no parent corporation and does not issue stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner National Association of Manufacturers respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The decision of the court of appeals (App., *infra*, 1a-47a) is reported at 817 F.3d 261. The court of appeals' denial of rehearing en banc, which is unreported, is reproduced at App., *infra*, 51a-52a.

JURISDICTION

The separate judgment of the court of appeals denying all motions to dismiss the petitions for review for lack of jurisdiction was entered on February 22, 2016. App., *infra*, 48a-50a. The court of appeals' order denying rehearing en banc was entered on April 21, 2016. On July 1, 2016, Justice Kagan extended the time to file this petition to September 2, 2016. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant portions of Section 509(b) of the Clean Water Act, 33 U.S.C. § 1369(b), are set forth at App., *infra*, 53a-54a.

STATEMENT

The Clean Water Act ("CWA" or "Act") defines "navigable waters" as "the waters of the United States." 33 U.S.C. § 1362(7). In June 2015, the U.S. Environmental Protection Agency ("EPA") and U.S. Army Corps of Engineers ("Corps") promulgated a final rule that significantly revised the scope of federal jurisdiction under the Act by redefining the term "waters of the United States." *Clean Water Rule:*

Definition of "Waters of the United States," 80 Fed. Reg. 37,054 (June 29, 2015) (the "WOTUS Rule" or "Rule").

The National Association of Manufacturers ("the NAM") is among scores of public and private plaintiffs—States, municipalities, and industry and environmental groups—that have challenged the WOTUS Rule. In the fifteen months since the new Rule became final no brief on the merits has yet been filed in any of these cases. Briefing on the merits in the Sixth Circuit is not due to be completed until mid-February 2017.

This bottleneck is due to an esoteric and wasteful debate over *where* the challenges to the Rule belong. The crux of the problem is the judicial review provision of the Clean Water Act, 33 U.S.C. § 1369(b). That provision funnels review of certain types of agency action directly to courts of appeals, leaving other challenges to be brought in the district courts under the Administrative Procedure Act. What should be a straightforward gatekeeping provision has in this and other cases generated widespread judicial disagreement, caused needless delay, and wasted valuable resources for no substantive purpose.

In particular, courts have disagreed over the interpretation of two categories of agency action that are specified in Section 1369(b) to trigger original circuit court review: actions "approving or promulgating any effluent limitation or other limitation" under certain provisions of the CWA, and actions "issuing or denying any permit" under the Act's National Pollutant Discharge Elimination System. *Id.* § 1369(b)(1)(E), (F). Virtually all district and circuit courts agree that the WOTUS Rule does not fall into either of those categories if the statutory words are given their plain meaning. However, courts have

divided over whether this Court's decisions in *E.I. du Pont de Nemours Co.* v. *Train*, 430 U.S. 112 (1977), and *Crown Simpson Pulp Co.* v. *Costle*, 445 U.S. 193 (1980)—and lower courts' conflicting glosses on those decisions—require a looser interpretation.

The decision here, in which the Sixth Circuit split 1-1-1 over Section 1369(b)'s applicability, exemplifies this disarray. The panel produced three separate and incommensurate opinions addressing whether it has jurisdiction to consider the rule challenges. And the judge who cast the deciding vote in favor of court of appeals jurisdiction did so *not* because he thought that result was a *correct* application of the statute, but because he felt himself bound by a circuit precedent that he deemed wrongly decided and that conflicts with decisions in other courts of appeals. No challenge to agency action—let alone agency action as consequential as the WOTUS Rule, which brings vast areas of the Nation under federal jurisdiction as "waters of the United States"—should be left to rest on such a precarious foundation.

The NAM has consistently argued that the WOTUS Rule does not fall under any Section 1369(b)(1) category and that jurisdiction over these cases therefore belongs in the district court. Its still-pending complaint filed in the Southern District of Texas, joined by over a dozen co-plaintiffs, argues that Section 1369(b) does not provide any basis for circuit court jurisdiction. See *Am. Farm Bureau Fed'n, et al.* v. *EPA*, No. 3:15-cv-165 (S.D. Tex.), Dkt. 1 at ¶¶ 6-9. And while the NAM's co-plaintiffs filed "protective" petitions for review in the Sixth Circuit to prevent their challenges from becoming untimely if the jurisdictional question were resolved in favor of circuit court review, the NAM did not do so. Instead, it intervened as a respondent in 11 of the 22 petitions

(which have all been consolidated) and moved to dismiss for lack of jurisdiction—precisely in order to ensure its standing to seek further review of the jurisdictional question before this Court.

The question presented here not only dogs the pending challenges to the WOTUS Rule, but also has confused and delayed prior rule challenges and certainly will disrupt future rule challenges. That is an intolerable situation. "[J]urisdictional rules should be clear." *Lapides* v. *Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 621 (2002). This Court's review is urgently required to determine where jurisdiction lies for the WOTUS Rule challenges, resolve the circuit split on Section 1369(b)'s meaning, and guide the federal courts in their future application of that provision.

A. The Clean Water Act

The Clean Water Act "prohibits 'the discharge of any pollutant' without a permit into 'navigable waters,' which it defines, in turn, as 'the waters of the United States.'" *U.S. Army Corps of Eng'rs* v. *Hawkes Co.*, 136 S. Ct. 1807, 1811 (2016) (citing 33 U.S.C. §§ 1311(a), 1362(7), (12)). Obtaining a permit is costly, and the penalties for discharging without one are substantial. *Id.* at 1812. The scope of "the waters of the United States" is therefore a matter of exceptional importance for landowners, industry and environmental groups, and government officials.

In *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 135 (1985), this Court concluded that the agencies permissibly interpreted "waters of the United States" to encompass wetlands that actually abutted traditional navigable waters. In *Solid Waste Agency of Northern Cook County* v. *U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*"), it struck down

the agencies' "Migratory Bird Rule," which purported to extend agency jurisdiction to any waters that are or might be used as habitat for migratory birds, no matter how isolated or remote from navigable waters. And in *Rapanos* v. *United States*, 547 U.S. 715 (2006), the Court reversed the agencies' determination that they had jurisdiction over wetlands that "lie near ditches or man-made drains that eventually empty into traditional navigable waters," which swept in "virtually any parcel of land containing a channel or conduit * * * through which rainwater or drainage may occasionally or intermittently flow." *Id.* at 722, 729 (plurality opinion).

The WOTUS Rule purports to clarify the definition of "waters of the United States" within the meaning of the CWA and *Rapanos*, *SWANCC*, and *Riverside Bayview*. 80 Fed. Reg. at 37,054.

B. The WOTUS Rule

The WOTUS Rule separates waters into three jurisdictional groups: waters that are categorically jurisdictional, waters that require a case-specific significant nexus evaluation to determine if they are jurisdictional, and waters that are categorically excluded from jurisdiction.

In the first group are waters that are categorically jurisdictional: (1) traditional navigable waters, (2) interstate waters, (3) territorial seas, (4) impoundments of any water deemed to be a "water of the United States," (5) certain tributaries, and (6) certain waters that are "adjacent" to the foregoing five categories of waters. 33 C.F.R. § 328.3(a).

In the second group are waters "that require a case-specific significant nexus evaluation" to determine if they are jurisdictional. 80 Fed. Reg. at 37,073. Waters that are subject to jurisdiction based on a case-

specific significant nexus determination include: (A) waters, any part of which are within the 100-year floodplain of a traditional navigable water, interstate water, or territorial sea; or (B) waters, any part of which are within 4,000 feet of the ordinary high water mark of any of those jurisdictional waters, any impoundment of those jurisdictional waters, or any covered tributary. 33 C.F.R. § 328.3(a)(8).

In the third group are waters always excluded from jurisdiction. These include: swimming pools, puddles. ornamental waters, prior converted cropland, waste treatment systems, certain kinds of drainage ditches, farm and stock watering ponds, settling basins, water-filled depressions incidental to mining or construction activity, subsurface drainage systems, and certain wastewater recycling structures. 33 C.F.R. § 328.3(b).

The NAM and its co-plaintiffs in the Southern District of Texas will show (once this case reaches the merits stage) that the WOTUS Rule violates this Court's precedents, is deeply flawed both in substance and procedurally, and consequently violates the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A)-(D). But to this point, uncertainty over the meaning of Section 1369(b) has meant that the NAM has spent the past 15 months since promulgation of the Rule litigating the issue of where jurisdiction over the merits belongs, in multiple forums.

C. The Clean Water Act's Judicial Review Provisions

The CWA grants the courts of appeals original jurisdiction to hear challenges to seven specified categories of final agency actions (App., *infra*, 53a-54a)—among them, insofar as relevant here, actions

> (E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title, [and]
>
> (F) in issuing or denying any permit under section 1342 of this title * * *.

33 U.S.C. § 1369(b)(1). This jurisdiction is not only original, but exclusive. *Decker* v. *Nw. Envt'l Def. Ctr.*, 133 S. Ct. 1326, 1334 (2013).

Section 1369(b) very clearly "extends only to *certain* suits challenging *some* agency actions." *Decker*, 133 S. Ct. at 1334 (emphasis added). Challenges to agency rules not specified in Section 1369(b) proceed under Sections 702 and 704 of the APA, which provide that "[a] person suffering legal wrong" or "adversely affected or aggrieved by agency action" may bring suit in district court for judicial review of any "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. §§ 702, 704. Thus, litigants whose claims do not fall within Section 1369(b)(1) may invoke a cause of action in district court under the APA and 28 U.S.C. § 1331. That Section 1369(b)(1) is not intended to be all-encompassing is confirmed by Section 1365(e), which preserves statutory and common law rights to seek relief against the Administrator (such as those available under the APA).

In promulgating the WOTUS Rule the agencies conceded that while Section 1369(b)(1) "provides for judicial review in the courts of appeals of specifically enumerated actions of the Administrator," courts "have reached different conclusions on the types of actions that fall within" that provision. 80 Fed. Reg. at 37,104.

D. Litigation Challenging The New Rule

Scores of state, municipal, industry, and environmental plaintiffs filed suits challenging the WOTUS

Rule in district courts around the country,[1] including the NAM, which filed suit along with other industry groups in the Southern District of Texas.[2]

The Judicial Panel on Multidistrict Litigation denied the federal government's request to consolidate the district court actions and to transfer them to the District Court for the District of Columbia. See *In re: Clean Water Rule*, MDL No. 2663, Dkt. 163 (JPML Oct. 13, 2015). The Judicial Panel held that transfer was inappropriate under 28 U.S.C. § 1407 because the complaints turn on issues of law, and held that "different jurisdictional rulings by the involved courts" also augured against consolidation. *Id.* at 2.

Reflecting uncertainty surrounding the scope of Section 1369(b), many plaintiffs who filed district court actions (but not the NAM) also filed "protective" petitions for review in various courts of appeals.[3] Those petitions for review were consolidated and transferred

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[1] Those actions are *North Dakota* v. *EPA*, No. 3:15-cv-59 (D.N.D.); *Murray Energy Corp.* v. *EPA*, No. 1:15-cv-110 (N.D. W. Va.); *Ohio* v. *EPA*, 2:15-cv-2467 (S.D. Ohio); *Texas* v. *EPA*, No. 3:15-cv-162 (S.D. Tex.); *Georgia* v. *McCarthy*, No. 2:15-cv-79 (S.D. Ga.); *Oklahoma ex rel. Pruitt* v. *EPA*, No. 4:15-cv-381 (N.D. Okla.); *Chamber of Commerce* v. *EPA*, No. 4:15-cv-386 (N.D. Okla.); *Southeastern Legal Foundation* v. *EPA*, No. 1:15-cv-2488-TCB (N.D. Ga.); *Washington Cattlemen's Association* v. *EPA*, No. 0:15-cv-3058 (D. Minn.); *Puget Soundkeeper Alliance* v. *McCarthy*, No. 2:15-cv-1342 (W.D. Wash.); *Waterkeeper Alliance* v. *EPA*, No. 3:15-cv-3927 (N.D. Cal.); *Natural Resources Defense Council* v. *EPA*, No. 1:15-cv-1324 (D.D.C.); and *Arizona Mining Ass'n* v. *EPA*, No. 2:15-cv-1752 (D. Az.).

[2] *Am. Farm Bureau Fed'n, et al.* v. *EPA*, No. 3:15-cv-165 (S.D. Tex.).

[3] The 22 petitions for review and more than 100 petitioners are identified in the Parties to the Proceeding Below section, *supra*, pp. ii-v.

to the Sixth Circuit pursuant to 28 U.S.C. § 2112(a). Consolidation Order, MCP No. 135 (JPML July 28, 2015).

The agencies moved to stay or dismiss cases in the district courts in favor of the circuit court litigation. All of the cases became ensnarled in the jurisdictional dispute, halting any progress towards the merits.

1. Confusion in the district courts

In August 2015, the U.S. District Court for the Northern District of West Virginia held that the Sixth Circuit had exclusive jurisdiction over Rule challenges. *Murray Energy Corp.* v. *EPA*, 2015 WL 5062506 (N.D. W. Va. Aug. 26, 2015). The U.S. District Court for the Southern District of Georgia reached the same conclusion. *Georgia* v. *McCarthy*, 2015 WL 5092568, at *3 (S.D. Ga. Aug. 27, 2015).

But the very same day as *McCarthy*, the U.S. District Court for the District of North Dakota affirmed its own jurisdiction, holding that Section 1369(b) does not apply. *North Dakota* v. *EPA*, 127 F. Supp. 3d 1047 (D.N.D. 2015). The court observed that "[i]f the exceptionally expansive view" of that provision "advocated by the government is adopted, it would encompass virtually all EPA actions under the Clean Water Act." *Id.* at 1053. The *North Dakota* court denied the agencies' motion to dismiss and preliminarily enjoined the operation of the Rule.[4]

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[4] See *North Dakota* v. *EPA*, 3:15-cv-59, Dkt. 79 (D.N.D. Sept. 4, 2015) (limiting the injunction to the States that were party to the challenge). After the Sixth Circuit ruled it had jurisdiction the North Dakota court denied the United States' renewed motion to dismiss and to dissolve the injunction and stayed the case "pending further decision by the Courts of Appeals or Supreme Court." *Id.*, Order, Dkt. 156 (May 24, 2016).

2. The Sixth Circuit refuses to dismiss the petitions for review

The NAM, which had not filed a protective petition for review, successfully moved to intervene as a respondent in the Sixth Circuit. Dkt. 8, No. 15-3751 cons. (6th Cir. Sept. 16, 2015). The NAM then moved to dismiss the petitions for review for want of jurisdiction. Dkt. 39, No. 15-3751 cons. (6th Cir. Oct. 2, 2015), as did many of the parties that had filed protective petitions for review.

The Sixth Circuit ordered full briefing and argument on jurisdiction. On October 9, acknowledging the "still open question whether * * * this litigation is properly pursued in this court or in the district courts," the Sixth Circuit issued a nationwide stay of the Rule to "temporarily silenc[e] the whirlwind of confusion that springs from uncertainty about the requirements of the new Rule and whether they will survive legal testing." *In re EPA*, 803 F.3d 804, 806, 808 (6th Cir. 2015). Judge Keith dissented, arguing that a stay was premature so long as the court's jurisdiction remained "in doubt." *Id.* at 809 (Keith, J., dissenting).

On February 22, 2016, the Sixth Circuit concluded, in an unusually fractured decision, that it and not the district courts had jurisdiction to hear the Rule challenges. The court of appeals' 1-1-1 decision produced its own "whirlwind of confusion." 803 F.3d at 808. Indeed, the only thing the panel could agree on was that subsections (E) and (F) were the "only two provisions of § 1369(b)(1)" that "potentially apply." App., *infra*, 8a. On all other issues the panel splintered.

a. Judge McKeague's opinion. Judge McKeague admitted that the government's textual arguments as to subsection (E) were "not compelling." App., *infra*, 9a.

"[T]he Rule's clarified definition," he wrote, does not "approve or promulgate *any* limitation that imposes *ipso facto* any restriction or requirement on point source operators or permit issuers." *Ibid.* (emphasis added). "Rather," it is "a definitional rule that, operating in conjunction with other regulations, will result in imposition of such limitations." *Ibid.*

Judge McKeague nevertheless concluded that jurisdiction lies in the court of appeals under subsection (E)—not because the statutory text requires it, but because this Court's decision in *E.I. du Pont de Nemours Co.* v. *Train* does so. Judge McKeague conceded that the *du Pont* case "can be read in more ways than one." App., *infra*, 10a. But he believed that *du Pont* "eschewed" a "literal reading" of Section 1369(b)(1) in favor of a "more generou[s]" interpretation than the statutory "language would indicate," and that this interpretation encompasses the WOTUS Rule because the Rule's "practical effect will be to *indirectly* produce various limitations on point-source operators and permit issuing authorities." App., *infra*, 10a, 13a, 17a.

Turning to Subsection (F), Judge McKeague recognized that the Rule does not "issue" or "deny" any permits. But he concluded that Subsection (F) ought not be given "a strict literal application" either. App., *infra*, 17a. In support, Judge McKeague cited this Court's opinion in *Crown Simpson Pulp Co.* v. *Costle* and the Sixth Circuit's decision in *National Cotton Council of America* v. *EPA*, 553 F.3d 927 (6th Cir. 2009). He reasoned that those decisions together authorize direct review in the circuit courts of any regulation that merely, in some indirect way, "*affects* permitting requirements." App., *infra*, 19a (emphasis added).

b. Judge Griffin's begrudging concurrence. Judge Griffin concurred in the judgment only. Like Judge McKeague, he concluded that the "plain text" of subsection (E) does not govern the petitions for review because the WOTUS Rule is not an "effluent limitation or other limitation." App., *infra*, 30a-31a. But unlike Judge McKeague, Judge Griffin refused to read *du Pont* as "shoehorning an exercise in jurisdictional line-drawing into subsection (E)'s 'other limitation' provision," and hence found no jurisdiction under Subsection (E). App., *infra*, 35a.

Canvassing the text and Supreme Court precedents, Judge Griffin also thought it plain that Subsection (F) "simply does not apply here." App., *infra*, 40a. He concurred in the judgment only because, in his view, the Sixth Circuit's earlier decision in "*National Cotton* dictates [the] conclusion" that Subsection (F) encompasses the WOTUS Rule—a conclusion he criticized because it means that subsection (F)'s "jurisdictional reach * * * has no end." App., *infra*, 42a. Judge Griffin explained that "while I agree" with Judge McKeague "that *National Cotton* controls this court's conclusion, I disagree that it was correctly decided. But for *National Cotton*, I would find jurisdiction lacking." App., *infra*, 38a-39a.

c. Judge Keith's dissent. Judge Keith dissented. He joined Judge Griffin in holding Subsection (E) inapplicable. App., *infra*, 45a. But he concluded that "*National Cotton*'s holding is not as elastic as the concurrence suggests." App., *infra*, 47a. It does not authorize original subject-matter jurisdiction over "all rules '*relating*' to [permitting] procedures, such as the one at issue here," which "merely defines the scope of the term 'waters of the United States.'" App., *infra*, 46a. Even read most broadly, *National Cotton* interpreted Section 1369(b) to reach only those rules that

"'regulate' or 'govern' [permitting] procedure," which the WOTUS Rule does not. *Ibid.* Observing that the Eleventh Circuit had rejected *National Cotton*'s reasoning in *Friends of the Everglades* v. *EPA*, 699 F.3d 1280 (11th Cir. 2012), Judge Keith saw no need to read *National Cotton* "in a way that expands the jurisdictional reach of subsection (F) in an all-encompassing, limitless fashion." App., *infra*, 46a-47a. He would have granted the motions to dismiss and sent the parties to the district courts for initial review.

The Sixth Circuit issued a separate judgment denying the motions to dismiss. App., *infra*, 48a-50a.

The NAM and others petitioned the Sixth Circuit to rehear its jurisdictional ruling *en banc*. The court denied rehearing over the dissent of Judge Keith. App., *infra*, 51a-52a. Thereafter, the court set a briefing schedule on a motion relating to the content of the administrative record, followed by the merits. Merits briefing will not be completed until mid-February 2017—*twenty months* after the EPA and the Corps first promulgated the Clean Water Rule. Case Management Order No. 2, Dkt. 99 (June 14, 2016).

E. The Aftermath Of The Sixth Circuit's Decision

Following the Sixth Circuit's fractured decision, the U.S. District Court for the Northern District of Oklahoma declined jurisdiction. *Oklahoma ex rel. Pruitt* v. *EPA*, 2016 WL 3189807 (N.D. Okla. Feb. 24, 2016). The government moved to dismiss or stay other cases, including in the Southern District of Texas, where the NAM's case is pending. The NAM opposed the government's motion, which remains pending. *Am. Farm Bureau Fed'n, et al.* v. *EPA*, 3:15-cv-165 (S.D. Tex.), Dkt. 50.

In August, the Eleventh Circuit abstained under *Colorado River* from deciding the appeal of the denial of a preliminary injunction for lack of jurisdiction in *Georgia* v. *McCarthy*, pending the Sixth Circuit's decision on the merits. *Georgia* v. *McCarthy*, 2016 WL 4363130 (11th Cir. Aug. 16, 2016).[5] Pointedly, the Eleventh Circuit did not endorse the Sixth Circuit's jurisdictional analysis. Nor did it order the district court to dismiss the case for lack of jurisdiction. Rather, relying on "[c]onsiderations of wise judicial administration," the court determined to "stay [its] hand" pending "further developments." *Id.* at *2.

REASONS FOR GRANTING THE PETITION

I. The Sixth Circuit Erroneously Took Jurisdiction Under Section 1369(b), In Conflict With Decisions Of Other Circuits.

"Section 1369(b) extends only to certain suits challenging some agency actions." *Decker* v. *Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1334 (2013). It does not extend to suits challenging the WOTUS Rule. A majority of the panel understood that fact. App., *infra*, 27a (Griffin, J.), 45a (Keith, J.). Judge Griffin nevertheless voted with Judge McKeague to exercise jurisdiction under Section 1369(b)(1)(F), believing that he was bound by the Sixth Circuit's "incorrect" decision in *National Cotton*. App, *infra*, 44a. The panel's decision to exercise jurisdiction was in error and in conflict with decisions of other circuits.

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[5] The NAM and its co-plaintiffs filed an *amicus* brief in the Eleventh Circuit in *McCarthy* urging reversal of the district court's decision declining jurisdiction. The NAM and its co-plaintiffs likewise filed an *amicus* brief in the Tenth Circuit in the *Pruitt* case urging reversal of the dismissal. The *Pruitt* appeal has not yet been decided.

A. The Sixth Circuit Lacks Jurisdiction Under Section 1369(b).

1. Section 1369(b)(1)(F) does not authorize the Sixth Circuit's review of the Rule. It grants courts of appeals original jurisdiction to "[r]eview * * * the Administrator's action * * * in issuing or denying any permit under section 1342." There are plenty of examples in which the EPA Administrator *actually* issues or denies a Section 1342 permit; those EPA actions are properly challenged in the courts of appeals.[6]

The WOTUS Rule, by contrast, does not issue or deny a permit. EPA Administrator Gina McCarthy admitted as much: "the Clean Water Rule is a jurisdictional rule. It doesn't result in automatic permit decisions." *The Fiscal Year 2016 EPA Budget: Joint Hearing Before the Subcomm. on Energy & Power & the Subcomm. on Environment & Economy of the House Comm. on Energy & Commerce*, 114th Cong. 70 (Feb. 25, 2015). Judge Griffin therefore was correct in concluding that "[o]n its face, subsection (F) clearly does not apply," because the Rule "neither issues nor denies a permit" under Section 1342. App., *infra*, 39a. "[T]his should end the analysis." *Ibid.*

Judge McKeague agreed that this reading is "consonant with the plain language" of the statute.

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[6] See, *e.g.*, *Nat. Res. Def. Council* v. *EPA*, 808 F.3d 556, 562 & n.4 (2d Cir. 2015) (challenging grant of Section 1342 permit to vessels); *Alaska Eskimo Whaling Comm'n* v. *EPA*, 791 F.3d 1088, 1090-1091 (9th Cir. 2015) (challenging grant of Section 1342 permit to oil and gas exploration facilities); *Upper Blackstone Water Pollution Abatement Dist.* v. *EPA*, 690 F.3d 9, 11, 20 (1st Cir. 2012) (challenging grant of Section 1342 permit to sewage treatment plant); *Alton Box Bd. Co.* v. *EPA*, 592 F.2d 395, 396 (7th Cir. 1979) (challenging denial of Section 1342 permit to mill).

App., *infra*, 23a-24a. But he chose not to apply that plain language on the ground that *Crown Simpson Pulp Co.* v. *Costle*, 445 U.S. 193 (1980), "opened the door to constructions other than a strict literal application." App., *infra*, 17a.

To put it plainly, Judge McKeague misread *Crown Simpson*. In that case, EPA vetoed Section 1342 permits that a California agency had issued to pulp mills after EPA had delegated permitting authority to the State. 445 U.S. at 194-195 & n.3. This Court held that the Ninth Circuit had jurisdiction under Section 1369(b)(1)(F) to review EPA's vetoes because "EPA's veto of a state-issued permit is functionally similar to its denial of a permit in States which do not administer an approved permit-issuing program" and had the "precise effect" of denying the permits. *Id.* at 196.

As Judge Griffin explained, *Crown Simpson*'s "'facts * * * make clear that the Court understood functional similarity in a narrow sense.'" App., *infra*, 40a. EPA effectively had denied Crown Simpson's Section 1342 permit applications in the most literal sense. Judge McKeague lost sight of those facts when he read *Crown Simpson* to allow courts of appeals to review any CWA regulation "so long as it affects permitting requirements." App., *infra*, 19a.

Congress could have written paragraph (F) to apply to EPA actions "affecting when permits are or are not required under Section 1342." But Judge McKeague's approach cannot be squared with the statute that Congress *actually* wrote, which applies to agency actions that *themselves* amount to "issuing or denying any permit under section 1342." As Judges Keith and Griffin recognized, it is difficult to imagine any case in which Judge McKeague's expansive re-drafting of paragraph (F) would not confer jurisdiction.

See App., *infra*, 42a (it means subsection (F)'s "jurisdictional reach * * * has no end") (Griffin, J.); App., *infra*, 47a (it "expands the jurisdictional reach of subsection (F) in an all-encompassing, limitless fashion") (Keith, J.).

Judge Keith explained in his dissent why Judge Griffin erred in nevertheless voting to exercise jurisdiction under Section 1369(b)(1)(F) on the ground that *National Cotton* required it. But Judge Griffin's belief that his vote was forced by the incorrect decision in *National Cotton* is of no moment here. Unbound by *National Cotton*, this Court is free to read the statute correctly.

2. A majority of the panel properly concluded that Section 1369(b)(1)(E) does not confer jurisdiction. App., *infra*, 29a-38a (Griffin, J.), 45a (Keith, J.); see also Gov't Opp. to Rh'g Pets. at 22 n.7, Dkt. 89 (Apr. 1, 2016) (conceding that the Sixth Circuit is not exercising jurisdiction under paragraph (E)). The agencies' contention that Section 1369(b)(1)(E) confers jurisdiction is mistaken.

Paragraph (E) grants jurisdiction to courts of appeals to review "the Administrator's action * * * in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345." It is undisputed that the Rule is *not* an "effluent limitation," which is a "restriction * * * on quantities, rates, and concentrations of chemical" or other constituents that are discharged into navigable waters. 33 U.S.C. § 1362(11); see App., *infra*, 8a-9a. The Rule also is not an "other limitation under section 1311, 1312, 1316, or 1345," for three independent reasons.

First, the Rule is not a "limitation" in any ordinary sense of that word. It does not directly restrict the use

to which property owners put their land. It purports only to define the phrase "waters of the United States," which describes the waters to which *other* CWA sections may apply. As Judge Griffin put it, the Rule "is not self-executing" but merely "operates in conjunction with other sections scattered throughout the Act to define when [the Act's other] restrictions * * * apply." App., *infra*, 31a; see also *id.* at 9a ("[T]he Rule's clarified definition is not self-executing"; only "operating in conjunction with other regulations [will it] result in imposition of such limitations") (McKeague, J.).

Second, the Rule is not an "other" limitation. The *ejusdem generis* canon requires reading a general term following a specific term as "embrac[ing] only objects similar in nature to those objects enumerated by the preceding specific words." *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 114-115 (2001). Application of the canon thus requires reading "other limitation" as embracing an object similar to an "effluent limitation." Effluent limitations are not just *any* limitation; rather, they "dictate in specific and technical terms the amount of each pollutant that a point source may emit." *Am. Paper Inst.* v. *EPA*, 890 F.2d 869, 876 (7th Cir. 1989). The Rule, which is a regulatory definition of "waters of the United States," is not even remotely similar in nature to an effluent limitation.

Third, the Rule is not an other limitation "under section 1311, 1312, 1316, or 1345." Each of those sections provides for the issuance of effluent limitations or effluent limitation-like rules. Section 1311 governs "effluent limitations." Section 1312 governs "water quality related effluent limitations," which are additional effluent limitations that may be imposed where other limitations fail to achieve water quality standards. Section 1316 requires establishment of

technology-based effluent controls for new dischargers. And Section 1345 restricts the discharge of sewage sludge. It would be a mistake to think of the agencies' definition of "waters of the United States" as a limitation at all; it would be downright absurd to say that, *as* a limitation, it has a purpose similar in nature to an effluent limitation describing the technical measures of pollutants allowed under a permit—much less that it was promulgated under any of the specifically identified statutory provisions. See App., *infra*, 30a-31a (Griffin, J.) (the Rule "does not emanate from these sections" and is not "related to the statutory boundaries set forth in [them]"); *Friends of the Everglades*, 699 F.3d at 1286 ("[E]ven if the water-transfer rule could be classified as a limitation, it was not promulgated under section 1311, 1312, 1316, or 1345").

3. There is another reason to reject interpreting paragraphs (E) or (F) as limitless grants of original jurisdiction to the courts of appeals over all agency rulemaking that touches on CWA permitting: the *expressio unius est exclusio alterius* canon, which provides that the expression of one thing implies the exclusion of another. Section 1369(b) meticulously catalogues seven categories of agency action subject to original review in the courts of appeals. Congress's careful selection "justif[ies] the inference" that a general grant to courts of appeals of jurisdiction over all CWA rules was "excluded by deliberate choice, not inadvertence." *Barnhart* v. *Peabody Coal Co.*, 537 U.S. 149, 168 (2003). "No sensible person accustomed to the use of words in laws would speak so narrowly and precisely of particular statutory provisions [in Section 1369(b)], while meaning to imply a more general and broad coverage than the statutes designated." *Long-*

view Fibre Co. v. *Rasmussen*, 980 F.2d 1307, 1313 (9th Cir. 1992).

That conclusion takes on special force when Section 1369(b) is considered alongside the much broader grant of jurisdiction to courts of appeals in the Clean Air Act. That statute provides for original jurisdiction in the courts of appeals over challenges not only to particular agency actions, but also to "any other nationally applicable regulations promulgated, or final action taken, by the Administrator" under the Act. 42 U.S.C. § 7607(b)(1). That language shows that Congress knows how to "ma[ke] express provisions" for expansive original jurisdiction in the courts of appeals when it wants to and that its "omission of the same [language]" from Section 1369(b)(1) "was purposeful." *Zadvydas* v. *Davis*, 533 U.S. 678, 708 (2001). In short, the panel plainly erred in exercising jurisdiction under Section 1369(b).

B. The Panel's Ruling Conflicts With Decisions Of Other Courts Of Appeals.

The panel's erroneous decision deepens a conflict among the circuits. In their preamble to the Rule the agencies acknowledged that "courts have reached different conclusions on the types of actions that fall within section [1369(b)]." 80 Fed. Reg. at 37,104; see also Allison LaPlante *et al.*, *On Judicial Review Under the Clean Water Act in the Wake of* Decker v. Northwest Environmental Defense Center: *What We Know Now and What We Have Yet to Find Out*, 43 ENVTL. L. 767, 767 (2013) (observing that decisions interpreting Section 1369(b) are "confusing and messy" because the "Circuits are split"). The panel's ruling—itself hopelessly fractured—cannot be reconciled with *Friends of the Everglades* v. *EPA*, 699 F.3d 1280 (11th Cir. 2012).

1. In *Friends of the Everglades*, the Eleventh Circuit held that it lacked original jurisdiction to review EPA's water transfer rule. 699 F.3d at 1283. That rule excludes from the CWA's prohibition of "any addition of any pollutant to navigable waters" without a Section 1342 permit an activity that "conveys or connects waters of the United States," provided the activity does not "subjec[t] the transferred water to intervening industrial, municipal, or commercial use." But it includes within the prohibition an activity in which "pollutants [are] introduced by the water transfer activity itself to the water being transferred." 40 C.F.R. § 122.3(i); see 33 U.S.C. § 1362(12).

EPA argued in *Friends* that Section 1369(b)(1)(F) provided jurisdiction because paragraph (F) "appl[ies] to any 'regulations relating to permitting itself" (699 F.3d at 1288)—the very argument that Judge McKeague accepted here. See App., *infra*, 19a. The Eleventh Circuit flatly rejected that contention because it is "contrary to the statutory text." 699 F.3d at 1288.

The Eleventh Circuit also declined to follow the Sixth Circuit's decision in *National Cotton*, explaining that *National Cotton* "provided no analysis" of Section 1369(b)(1)(F) and "cited two decisions of the Ninth Circuit that the Ninth Circuit had distinguished in *Northwest Environmental Advocates*" (a decision we discuss below). 699 F.3d at 1288. Here, Judge Griffin found the Eleventh Circuit's criticisms of *National Cotton* to "have merit," but concluded that he was nevertheless bound by *National Cotton* as prior Sixth Circuit precedent. App., *infra*, 43a. "But for *National Cotton*," he—and thus the panel—would have granted the motions to dismiss. *Id.* at 39a.

The WOTUS Rule purports to clarify the CWA's jurisdictional reach as defined by the statutory phrase

"waters of the United States" in 33 U.S.C. § 1362(7), which, the agencies say, "establishes where the Act's prohibitions and requirements apply." See App., *infra*, 32a. The water transfer rule at issue in *Friends of the Everglades*, in defining when a transfer of water through a point source is or is not an "addition of any pollutant" under Section 1362(12), likewise established circumstances in which "'the Act's prohibitions and requirements apply.'" There is no plausible argument that Section 1369(b) gave the court of appeals jurisdiction here but not in *Friends*.

The agencies mistakenly contend that the cases are distinguishable because the water transfer rule creates an "exemption." *E.g.*, U.S. Response Br., *Chamber of Commerce* v. *EPA*, No. 16-5038, *supra*, at 52 n.8 (asserting that *Friends* is "not on point" because it "considered *exemptions* from [CWA] requirements"). That is mere wordplay. Calling a rule an "exemption" is just another way of saying that a rule defines when the Act's requirements apply and when they do not. That is especially clear in *Friends*, where the rule on its face described water transfers that are included in the Section 1342 prohibition—transfers that involve the intervening use of the water or that themselves introduce pollutants to the water—as well as transfers that are excluded.

Against this backdrop, there is no doubt that if the JPML had consolidated the petitions for review of the WOTUS Rule in the Eleventh Circuit instead of the Sixth Circuit, the challenges would have been dismissed for want of jurisdiction under *Friends*.

2. The panel's ruling also is at odds with the Ninth Circuit's decision in *Northwest Environmental Advocates* v. *EPA*, 537 F.3d 1006 (9th Cir. 2008). The plaintiff in *Northwest Environmental Advocates* filed

an APA action in the district court challenging a regulation that exempted certain vessel discharges from Section 1342 permitting. EPA argued on appeal that the district court lacked jurisdiction because the challenge fell within Section 1369(b)'s grant of exclusive jurisdiction to the courts of appeals. The Ninth Circuit disagreed. *Id.* at 1015-1018.

The Ninth Circuit refused to "lightly hold that we have jurisdiction under section [1369(b)]." 537 F.3d at 1015. It "counseled against * * * expansive application" of that jurisdictional grant because "'no sensible person would speak with'" the degree of "'specificity and precision'" that Congress used in Section 1369(b) if an expansive application is what it intended. *Ibid.* The Ninth Circuit held that original court of appeals jurisdiction is proper under Subsection (E) only if a rule clearly imposes a limitation, or under Subsection (F) only if the "EPA actions [are] 'functionally similar' to the denial of permits." *Id.* at 1016 (quoting *Crown Simpson*, 445 U.S. at 196). And "the facts of [*Crown Simpson*] make clear that th[is] Court understood functional similarity in a narrow sense." *Ibid.* Because the exemption at issue involved neither the issuance or denial of a permit or a functionally similar action, nor the approval or promulgation of any effluent or other limitation, Section 1369(b) did not govern.

3. The panel's decision is also contrary to the North Dakota district court's decision that it—not courts of appeals—has jurisdiction to review the WOTUS Rule. *North Dakota* v. *EPA*, 127 F. Supp. 3d 1047, 1052-1053 (D.N.D. 2015). The district court favorably cited the Eleventh Circuit's decision in *Friends* and correctly held that the agencies' argument "run[s] precisely contrary to Congress' intent in drafting" Section 1369(b) narrowly. *Id.* at 1053. The district court reaffirmed that decision by refusing to dismiss the case

after the Sixth Circuit panel issued its decision. Order, Dkt. 156, No. 3:15-cv-59 (D.N.D. May 24, 2016).

As the agencies argued in opposing the challengers' petitions for en banc rehearing, achieving "uniformity among the circuits" is "the province of the Supreme Court." Gov't Opp. to Rh'g Pets. at 22. So it is. The Court should grant certiorari here to bring that uniformity.

II. The Question Presented Is Of Immense And Immediate Practical Importance.

A. Uncertainty Over The Meaning Of Section 1369(b) Causes Delay And Waste Of Judicial And Party Resources.

1. This Court has recognized that the manner of challenging federal environmental regulations is an issue of exceptional importance. See *Harrison* v. *PPG Indus., Inc.*, 446 U.S. 578, 586 (1980) ("We granted certiorari * * * because of the importance of determining the locus of judicial review of the actions of EPA [under the Clean Air Act]"). The panel here acknowledged "the nationwide importance of the matter." Order at 2, Dkt. 78 (6th Cir. Mar. 16, 2016). So did EPA when it petitioned for certiorari from the Eleventh Circuit's decision in *Friends of the Everglades*. There, EPA urged this Court to grant certiorari on the Section 1369(b) issue because "the proper time and manner of judicial challenges to the Water Transfers Rule and similar NPDES-related regulations" "presents a question of exceptional importance" that "has significant consequences for the applicable statute of limitations and mode of litigation" and that has given rise to circuit "conflicts." U.S. Pet'n for Cert., No. 13-10, at 9 (U.S. 2013). Commentators agree. See LaPlante, *supra*, 43 ENVTL. L. at 772 ("[T]here is no denying that questions regarding

section [1369](b)(1)'s reach are important and need to be resolved by the High Court").

This Court has recognized time and again that "administrative simplicity is a major virtue in a jurisdictional statute." *Hertz Corp.* v. *Friend*, 559 U.S. 77, 94 (2010). "Complex jurisdictional tests complicate a case, eating up time and money as the parties litigate, not the merits of their claims, but which court is the right court to decide those claims." *Ibid.* "Judicial resources too are at stake" because "[c]ourts have an independent obligation to determine whether subject-matter jurisdiction exists, even when no party challenges it." *Ibid.* (citing *Arbaugh* v. *Y & H Corp.*, 546 U.S. 500, 514 (2006)). "So courts benefit from straightforward rules under which they can readily assure themselves of their power to hear a case." *Ibid.*

Nowhere are these truths more apparent than with respect to Section 1369(b). Because of the great uncertainty in the case law, parties cannot know which court (or courts) will rule that it has power to decide a CWA rule challenge. As a result, challenges are routinely filed both in the district courts and in the courts of appeals—a wasteful practice that the agencies concede is appropriate "to preserve a forum for [challengers'] claims" "[g]iven uncertain jurisdiction." U.S. Response Br., *Chamber of Commerce* v. *EPA*, No. 16-5038, *supra*, at 24.[7] This uncertainty produces duplicative litigation, conflicting decisions on

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[7] The Seventh Circuit in *Roll Coater, Inc.* v. *Reilly*, 932 F.2d 668, 671 (7th Cir. 1991), warned that "careful counsel must respond to" the "uncertain opportunities for review" of CWA regulations by "filing buckshot petitions" both in the district court and court of appeals. That is precisely what challengers do. See, *e.g.*, *Friends of the Everglades*, 699 F.3d at 1283; *National Cotton*, 553 F.3d at 932; *Nw. Envtl. Advocates*, 537 F.3d at 1014.

jurisdiction, significant delay, and tremendous waste of judicial and party resources. It also leaves merits decisions vulnerable to appellate reversal on grounds other than the merits, creating additional uncertainty. And the problem is unavoidable because every federal court has an independent obligation to determine if it has subject-matter jurisdiction.

2. The challenges to this Rule are a case in point. The agencies admit that "there is no denying the importance of the Clean Water Rule." Gov't Opp. to Rh'g Pets. at 12. Because of the Rule's importance, State, municipal, industry, and environmental parties filed complaints in district courts and 22 petitions for review in the courts of appeals to guarantee that they preserved their challenges. See *supra*, p. 8.

Before the Sixth Circuit issued its decision, three district courts had ruled on jurisdiction, reaching conflicting determinations. *Supra*, p. 9. After the panel's ruling, a district court *sua sponte* dismissed an APA challenge for lack of jurisdiction, another denied the agencies' motion to dismiss, another has the agencies' motion under advisement, and still others have stayed the cases. *Supra*, p. 13. On appeal from a district court's denial of a preliminary injunction against the Rule for want of jurisdiction, the Eleventh Circuit abstained, holding the case in abeyance and ordering the district court to stay, not dismiss, APA proceedings. *Georgia* v. *McCarthy*, 2016 WL 4363130, at *3 (11th Cir. Aug. 16, 2016). And the Tenth Circuit is currently considering an appeal from the dismissal of an APA action for lack of jurisdiction. *Supra*, p. 14. This garbled state of affairs is intolerable.

For its part, the NAM has invested substantial time and money in the proceedings on jurisdiction—as have State, municipal, industry, and environmental

parties, the agencies, and the courts. Only now, long after the agencies promulgated the Rule, are the parties even beginning to brief the merits. And they are doing so before a court that they believe lacks jurisdiction—which puts a merits decision by a Sixth Circuit at risk upon further review.

3. Earlier challenges to EPA's water transfer rule provide another example. That rule was issued in 2008. *Friends of the Everglades*, 699 F.3d at 1284. Challenges were brought in the district courts and courts of appeals. The latter were consolidated in the Eleventh Circuit, which held it lacked original jurisdiction over the rule challenges. *Id.* at 1286. After the United States unsuccessfully sought certiorari to review the jurisdiction ruling (No. 13-10), litigation proceeded in the district court, which ruled on the merits in 2014—*six years* after the regulation was issued. *Catskill Mountains Chapter of Trout Unlimited, Inc.* v. *EPA*, 8 F. Supp. 3d 500, 516 (S.D.N.Y. 2014). The appeal from that decision remains pending today.

EPA stipulated that, in light of the Eleventh Circuit's decision, it is collaterally estopped from challenging the district court's jurisdiction in the Second Circuit. EPA Br. at 3-4 & n.2, Dkt. 210, No. 14-1823(L) (2d Cir. Sept. 11, 2014). That seems unlikely. But even if that proposition were correct, parties in the district court that did not participate in *Friends* may challenge an unfavorable ruling from the Second Circuit by arguing on petition for rehearing or certiorari that the district court lacked subject-matter jurisdiction—a non-waivable issue—and that the Second Circuit's decision therefore must be vacated. Cf. *Ford Motor Co.* v. *United States*, 134 S. Ct. 510, 510 (2013) (per curiam) (granting certiorari, vacating, and remanding after the United States, which "acquiesced in jurisdiction in the lower courts," contended "for the

first time" in its brief in opposition that the lower courts lacked subject-matter jurisdiction). This ace up the sleeve threatens to return the parties and courts to square one, nearly a decade after EPA issued the water transfer rule.

It is for just these reasons that "jurisdictional rules should be clear." *Lapides*, 535 U.S. at 621. The law interpreting Section 1369(b) is anything but—and confusion is only compounded by the extraordinary 1-1-1 decision below. This Court's intervention is urgently needed to bring clarity and certainty to jurisdiction over CWA rule challenges.

B. The Panel's Decision Would Deny Parties, Agencies, And Courts Of The Benefits Of Multilateral Review Of Agency Rulemaking.

1. The agencies have urged that it is good policy to funnel CWA rule challenges into a single court of appeals to provide "efficient, timely, and nationally-binding review of fundamental Clean Water Act regulatory actions." U.S. Response Br., *Chamber of Commerce* v. *EPA*, No. 16-5038, *supra*, at 60. In other words, the "policy" the agencies are concerned about is their own convenience and desire to suppress the full airing of issues that comes with multi-court review.

Those concerns carry no weight in the face of plain statutory language. As this Court has observed, jurisdiction "must of course be governed by the intent of Congress and not by any views [courts] may have about sound policy." *Fla. Power & Light Co.* v. *Lorion*, 470 U.S. 729, 746 (1985). Put another way, "[i]t is not [the Court's] task to determine which would be the ideal forum for judicial review of the Administrator's decision in this case." *Harrison*, 446 U.S. at 593. As EPA has been told before, it may not "avoid the Congressional intent clearly expressed in the text

simply by asserting that its preferred approach would be better policy." *Friends of the Earth* v. *EPA*, 446 F.3d 140, 145 (D.C. Cir. 2006).

2. In fact, the panel's ruling, if allowed to stand, would disserve the federal judicial process, which depends on district courts and courts of appeals independently analyzing legal issues. Under the panel's ruling, challenges to important CWA regulations would be funneled to a single court of appeals, without the benefit of initial consideration by the district courts or the opinions of the other federal courts of appeals on the same issues. The quality of legal decision-making—and of this Court's ability to decide which cases to review—would be diminished.

Debate among lower courts "helps to explain and formulate the underlying principles this Court * * * must consider." *Obergefell* v. *Hodges*, 135 S. Ct. 2584, 2597 (2015). It also "winnows out the unnecessary and discordant elements of doctrine." *California* v. *Carney*, 471 U.S. 386, 400-401 (1985) (Stevens, J., dissenting) (citing Benjamin Cardozo, THE NATURE OF THE JUDICIAL PROCESS 179 (1921)). Accordingly, this Court typically "permit[s] several courts of appeals to explore a difficult question before [it] grants certiorari." *United States* v. *Mendoza*, 464 U.S. 154, 160 (1984); see, *e.g.*, *Obergefell*, 135 S. Ct. at 2597.

The benefits of multi-court review accrue as clearly in the review of administrative rules as in other types of cases. See Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PA. L. REV. 1111, 1155 (1990) (explaining "[w]hy [we] should * * * take uniform administrative decisions and subject them to review in the various regional circuit courts under a system that makes it possible for these courts to disagree with one another"). These benefits include

that "the possibility of intercircuit disagreement provides a simple device for signaling that certain hard cases are worthy of additional judicial resources"; that "the doctrinal dialogue that occurs when a court of appeals addresses the legal reasoning of another and reaches a contrary conclusion * * * improves the quality of legal decisions"; and that exploration of an issue by multiple courts aids this Court "both in its consideration of the legal merits of an issue and in its case selection decisions." *Id.* at 1156-1157.

Thus the circuit splits that the agencies fear may arise from initial consideration in multiple district courts "increase the probability of a correct disposition" (*Atchison, Topeka & Santa Fe Ry. Co.* v. *Pena*, 44 F.3d 437, 447 (7th Cir. 1994) (Easterbrook, J., concurring)), and tee up issues more thoroughly for this Court's consideration. There is nothing about agency regulations that makes this process less appropriate for rule challenges than for other types of cases, like those involving the meaning or constitutionality of federal statutes. All the benefits of multi-court consideration would be lost if Section 1369(b) were stretched beyond the defined categories of agency action that Congress designated for original court of appeals review.

3. Furthermore, Section 1369(b) must be read in light of the default rule that Congress established in the APA, which is that agency action is subject to multilateral judicial review. "[I]n the absence or inadequacy" of a "special statutory review proceeding," any "person suffering legal wrong because of agency action" is "entitled to judicial review" "in a court of competent jurisdiction." 5 U.S.C. §§ 702-703. A plaintiff generally may file suit where it resides. See 28 U.S.C. §§ 1331, 1391(e); see also *Bowen* v. *Massachusetts*, 487 U.S. 879, 904 (1988) (Congress "inten[ded] that [the APA] cover a broad spectrum of administrative actions,

and this Court has echoed that theme by noting that the [APA's] 'generous review provisions' must be given a 'hospitable' interpretation"). In the absence of a clear statement from Congress in Section 1369(b), the Sixth Circuit should not have upended the APA judicial review process. This Court should grant certiorari to restore APA review to CWA rulemaking outside the narrow categories that Congress expressly specified in Section 1369(b).

C. Interlocutory Review Is Warranted

The interlocutory posture of the case counsels here in favor of an immediate grant of review. If, as we have argued—and as two of the panel judges believed—jurisdiction lies in the district courts under the APA, a merits ruling in the Sixth Circuit would serve no purpose. This Court would have no more authority to review a merits decision by the Sixth Circuit than would the Sixth Circuit to issue such a decision in the first place.

It thus makes no sense to delay deciding whether the court now addressing the merits has the statutory authority to do so while the parties file and the Sixth Circuit reads hundreds of pages of briefs, the court of appeals conducts oral argument and prepares an opinion (or opinions) on the merits, and untold party and judicial resources are expended in the process. Given the resources to be devoted to litigating the merits—and the importance of and great uncertainty over the correct resolution of the jurisdictional issue, in this case and more generally—immediate resolution of the question presented is imperative. Otherwise, the shadow of uncertain jurisdiction will hang over the merits stage before the panel, to reappear at the merits rehearing and certiorari stages. And a reversal on jurisdiction would hit the reset button on what by then

will have been years of litigation. Immediate review thus would serve the interests of regulators and regulated alike by ensuring that a merits decision actually resolves the merits and is not upended by a legal error over jurisdiction. It also would ensure that while the jurisdictional dispute plays out in this case, parties challenging new CWA rules do not face the same uncertainty over jurisdiction.

This Court routinely grants review of jurisdictional determinations even when (as here) the court of appeals holds jurisdiction proper and orders further proceedings. *E.g.*, *Walden* v. *Fiore*, 134 S. Ct. 1115 (2014) (reviewing question concerning personal jurisdiction).

This Court's finality jurisprudence under 28 U.S.C. § 1257 also is instructive. The Court in *Mercantile National Bank* v. *Langdeau*, 371 U.S. 555, 557-558 (1963), reviewed a state court's interlocutory venue decision because it was "a separate and independent matter, anterior to the merits" and it made sense "to determine now" in which court "appellants may be tried rather than to subject them, and appellee, to long and complex litigation which may all be for naught if consideration of the preliminary question of venue is postponed until the conclusion of the proceedings." If those considerations are sufficient to overcome even the barriers to review of non-final state court rulings, they should easily warrant interlocutory review of a federal court decision here.

Regardless of how this Court ultimately interprets Section 1369(b), Clean Water Act litigants deserve an answer to the question presented to bring to an end the current jurisdictional morass.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 2016

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

IN RE: UNITED STATES DEPARTMENT OF DEFENSE AND UNITED STATES ENVIRONMENTAL PROTECTION AGENCY FINAL RULE: CLEAN WATER RULE: DEFINITION OF "WATERS OF THE UNITED STATES," 80 FED. REG. 37,054 (JUNE 29, 2015).

MURRAY ENERGY CORPORATION (15-3751); STATE OF OHIO, ET AL. (15-3799); NATIONAL WILDLIFE FEDERATION (15-3817); NATURAL RESOURCES DEFENSE COUNCIL, INC. (15-3820); STATE OF OKLAHOMA (15-3822); CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, ET AL. (15-3823); STATE OF NORTH DAKOTA, ET AL. (15-3831); WATERKEEPER ALLIANCE INC., ET AL. (15-3837); PUGET SOUNDKEEPER ALLIANCE, ET AL. (15-3839); AMERICAN FARM BUREAU FEDERATION, ET AL. (15-3850); STATE OF TEXAS, ET AL. (15-3853); UTILITY WATER ACT GROUP (15-3858); SOUTHEASTERN LEGAL FOUNDATION, INC., ET AL. (15-3885); STATE OF GEORGIA, ET AL. (15-3887); ONE HUNDRED MILES, ET AL. (15-3948); SOUTHEAST STORMWATER ASSOCIATION, INC., ET AL. (15-4159); MICHIGAN FARM BUREAU (15-4162); WASHINGTON CATTLEMEN'S ASSOCIATION (15-4188); ASSOCIATION OF AMERICAN RAILROADS, ET AL. (15-4211); TEXAS ALLIANCE FOR RESPONSIBLE GROWTH, ENVIRONMENT, AND TRANSPORTATION (15-4234); AMERICAN EXPLORATION & MINING ASSOCIATION (15-4305); ARIZONA MINING ASSOCIATION, ET AL. (15-4404),

Petitioners,

v.

UNITED STATES DEPARTMENT OF DEFENSE, DEPARTMENT OF THE ARMY CORPS OF ENGINEERS AND UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

Respondents.

Nos. 15-3751 /3799/ 3817/
3820/ 3822/ 3823/ 3831/
3837/ 3839/ 3850/ 3853/ 3858/
3885/ 3887/ 3948/4159/ 4162/
4188/ 4211/ 4234/ 4305/ 4404

On Petitions for Review of Final Rule of the United States Department of Defense and United States Environmental Protection Agency.

Judicial Panel on Multi-District Litigation, No. 135.

Argued: December 8, 2015
Decided and Filed: February 22, 2016

Before: KEITH, McKEAGUE, and GRIFFIN, *Circuit Judges.*

COUNSEL

ARGUED: Eric E. Murphy, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Petitioners. Martha C. Mann, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Respondents.

McKEAGUE, J., delivered the opinion in which GRIFFIN, J., joined in the result. GRIFFIN, J., delivered a separate opinion concurring in the judgment. KEITH, J., delivered a separate dissenting opinion.

OPINION

McKEAGUE, *Circuit Judge.* This multi-circuit case consists of numerous consolidated petitions challenging the validity of the "Clean Water Rule" recently published by the U.S. Army Corps of Engineers and U.S. Environmental Protection Agency ("the Agencies"). The Clean Water Rule is intended to clarify the scope of "the waters of the United States" subject to protection under the Clean Water Act. The Act provides that certain specified actions of the EPA Administrator are reviewable directly in the U.S. Circuit Courts of Appeals. Because of uncertainty about whether the Agencies' adoption of the Clean Water Rule is among these specified actions, parties challenging the Rule have filed petitions in both district courts and circuit courts across the country. Many of the petitions have been transferred to the Sixth Circuit for consolidation in this action. Many of the petitioners and other parties now move to dismiss the very petitions they filed invoking this court's jurisdiction, contending this court lacks jurisdiction to review the Clean Water Rule.

The movants find support for their position in the language of the Clean Water Act's judicial review provisions, which purport to define circuit court jurisdiction specifically and narrowly. Over the last 35

years, however, courts, including the Supreme Court and the Sixth Circuit, have favored a "functional" approach over a "formalistic" one in construing these provisions. These precedents support the Agencies' position that this court does have jurisdiction. The district courts that have confronted the jurisdictional question in this litigation have arrived at conflicting answers.[1] For the reasons that follow I conclude that Congress's manifest purposes are best fulfilled by our exercise of jurisdiction to review the instant petitions for review of the Clean Water Rule.

I. BACKGROUND

Petitioners in these various actions, transferred to and consolidated in this court by the Judicial Panel on Multi-District Litigation for handling as a multi-circuit case, challenge the validity of a Final Rule adopted by respondents U.S. Army Corps of Engineers and U.S. Environmental Protection Agency, "the Clean Water Rule." 80 Fed. Reg. 37,054 (June 29, 2015). The Clean Water Rule clarifies the definition of "waters of the United States," as used in the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, "through increased use of bright-line boundaries" to make "the process of identifying waters protected under the Clean Water Act easier to understand, more predictable and consistent with the law and peer reviewed

---

[1] *See Murray Energy Corp. v. U.S. E.P.A.*, 2015 WL 5062506 (N.D. W.Va. Aug. 26, 2015) (holding jurisdiction lies in circuit court); *State of Georgia v. McCarthy*, 2015 WL 5092568 at *2–3 (S.D. Ga. Aug. 27, 2015) (same); *North Dakota v. U.S. E.P.A.*, 2015 WL 5060744 at *2 (D. N.D. Aug. 27, 2015) (holding jurisdiction lies in district court).

science, while protecting the streams and wetlands that form the foundation of our nation's water resources." 80 Fed. Reg. at 37,055. Petitioners contend that the definitional changes effect an expansion of respondent Agencies' regulatory jurisdiction and dramatically alter the existing balance of federal-state collaboration in restoring and maintaining the integrity of the nation's waters. Petitioners also contend the new bright-line boundaries used to determine which tributaries and waters adjacent to navigable waters have a "significant nexus" to waters protected under the Act are not consistent with the law as defined by the Supreme Court, and were adopted by a process not in conformity with the rulemaking requirements of the Administrative Procedures Act ("APA"). The Agencies maintain that the requirements of the APA were met and that the Rule is a proper exercise of their authority under the Clean Water Act.

The Rule became effective on August 28, 2015. On October 9, 2015, however, we issued a nationwide stay of the Rule pending further proceedings in this action. *In re EPA and Dep't of Def. Final Rule*, 803 F.3d 804 (6th Cir. 2015). We found that petitioners had demonstrated a substantial possibility of success on the merits of their claims and that the balance of harms militated in favor of preserving the status quo pending judicial review.

Meanwhile, eight motions to dismiss have been filed by numerous petitioners and intervenors. The motions assert that judicial review is properly had in the district courts, not here. They contend the instant challenges to the Clean Water Rule do not come within the judicial review provisions of the Clean Water Act, 33 U.S.C. § 1369(b)(1).

Section 1369(b)(1) identifies seven kinds of action by the EPA Administrator that are reviewable directly in the circuit courts. Only two of the seven kinds of action listed in § 1369(b)(1) are implicated here, subsections (E) and (F). In its entirety, § 1369(b)(1) provides as follows:

> (1) Review of the Administrator's action
>
> (A) in promulgating any standard of performance under section 1316 of this title,
>
> (B) in making any determination pursuant to section 1316(b)(1)(C) of this title,
>
> (C) in promulgating any effluent standard, prohibition, or pretreatment standard under section 1317 of this title,
>
> (D) in making any determination as to a State permit program submitted under section 1342(b) of this title,
>
> (E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title,
>
> (F) in issuing or denying any permit under section 1342 of this title, and
>
> (G) in promulgating any individual control strategy under section 1314(l) of this title,
>
> may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts business which is directly affected by such action upon application by such person.

> Any such application shall be made within 120 days from the date of such determination, approval, promulgation, issuance or denial, or after such date only if such application is based solely on grounds which arose after such 120th day.

33 U.S.C. § 1369(b)(1).

Movants contend the EPA's and the Corps' adoption and promulgation of the Clean Water Rule is not action of the Administrator "in issuing or promulgating any effluent limitation or other limitation" or "in issuing or denying any permit" under § 1369(b)(1)(E) or (F). They contend the Clean Water Rule is simply a definitional rule and that neither the statutory language nor the legislative history evidences congressional intent to authorize direct review of such action in the circuit courts.

II. ANALYSIS

A. General Standards

The question of subject matter jurisdiction is a question of law the court addresses de novo. *Iowa League of Cities v. U.S. E.P.A.*, 711 F.3d 844, 861 (8th Cir. 2013). That is, the Agencies' interpretation of the Clean Water Act is entitled to no deference in this regard. *Friends of the Everglades v. U.S. E.P.A.*, 699 F.3d 1280, 1285 (11th Cir. 2012).

Federal courts are courts of limited jurisdiction and have subject matter jurisdiction only as authorized by the Constitution and by Congress. *Id.* at 1289. Here, the court's authority to conduct direct review of the Agencies' challenged action, must be found, if at all, in the Clean Water Act, 33 U.S.C. § 1369(b)(1). *Id.* at 1285 (recognizing availability of

direct circuit court review only over those actions specifically enumerated in § 1369(b)(1)). Not all actions taken under the Clean Water Act are directly reviewable in the circuit courts. *Nat'l Cotton Council of America v. U.S. E.P.A.*, 553 F.3d 927, 933 (6th Cir. 2009). Where review is available under § 1369(b)(1), "it is the exclusive means of challenging actions covered by the statute." *Decker v. Nw. Envtl. Def. Ctr.*, 133 S.Ct. 1326, 1334 (2013). Matters not reviewable under § 1369(b)(1) may be actionable in the district courts by other means. *See id.* (recognizing availability of private enforcement action under 33 U.S.C. § 1365); *Narragansett Elec. Co. v. U.S. E.P.A.*, 407 F.3d 1, 8 (1st Cir. 2005) (recognizing availability of judicial review in district court under the APA).

Whether subject matter jurisdiction lies in the circuit courts is governed by the intent of Congress. *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 746 (1985). In determining the scope of circuit court jurisdiction Congress intended to prescribe under the Clean Water Act, the analysis must begin with the statutory language. *Id.* at 735. Yet, even where statutory language may seem unambiguous, "plain meaning, like beauty, is sometimes in the eye of the beholder." *Id.* at 737. The parties agree that subsections (E) and (F) are the only two provisions of § 1369(b)(1) that potentially apply.

B. Statutory Language

1. Subsection (E)—"Other Limitation"

Movants contend the Rule's definition of "waters of the United States" is not, under § 1369(b)(1)(E), "an effluent limitation or other limitation" approved or promulgated under 33 U.S.C. § 1311, 1312, 1316, or 1345. "Effluent limitation" is defined as "any re-

striction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance." 33 U.S.C. § 1362(11).

The Agencies do not contend that the Clean Water Rule is an action in approving or promulgating an effluent limitation, but rather that it is an "other limitation." The Act does not define "other limitation." Inasmuch as "effluent limitation" is defined as a "restriction" on discharges from point sources, the Agencies contend "other limitation" must be understood as a different kind of "restriction." They contend the Rule's clarification of the scope of "waters of the United States" protected under the Clean Water Act constitutes an "other limitation" in two respects. First, it has the effect of restricting the actions of property owners who discharge pollutants from a point source into covered waters. Second, it has the effect of imposing limitations or restrictions on regulatory bodies charged with responsibility for issuing permits under the National Pollutant Discharge Elimination System ("NPDES") to those who discharge pollutants into covered waters.

On its face, the Agencies' argument is not compelling. After all, the Rule's clarified definition is not self-executing. By clarifying the definition, the Agencies did not approve or promulgate any limitation that imposes *ipso facto* any restriction or requirement on point source operators or permit issuers. Rather, they promulgated a definitional rule that, operating in conjunction with other regulations, will result in imposition of such limitations. Is such

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an indirect consequence sufficient to bring the Rule within the scope of § 1369(b)(1)(E)?

The Agencies say yes and cite several cases in support. The seminal case supporting their construction of subsection (E) is *E.I. du Pont de Nemours Co. v. Train*, 430 U.S. 112, 136 (1977), where the Supreme Court eschewed a strict, literal reading. The Court characterized a construction that would provide for direct circuit court review of individual actions issuing or denying permits, but disallowed such review of the "basic regulations governing those individual actions," as a "truly perverse situation." *Id.* Hence, even though § 1369(b)(1) provided for circuit court review only of limitations promulgated under certain enumerated sections, and the challenged regulation was promulgated under a different section—which was, however, closely related to one of the enumerated sections—the Court had "no doubt that Congress intended review of the two sets of regulations to be had in the same forum." *Id.* at 136–37. The Court thus construed § 1369(b)(1)(E), in light of Congress's manifest intent, to encompass review of more agency actions than a literal reading of the provision would suggest.

E.I. du Pont can be read in more ways than one. As the Agencies see it, the Clean Water Rule is a "basic regulation governing those individual actions" taken by the EPA Administrator (e.g., promulgation of limitations) that *are* subject to direct circuit court review. Accordingly, giving § 1369(b)(1) a practical construction per *E.I. du Pont*, the Agencies argue that Congress intended the lawfulness of the Clean Water Rule to be subject to direct circuit court review.

Their position finds support in several decisions of our sister circuits. In *Nat. Res. Def. Council v. U.S. E.P.A.*, 673 F.2d 400 (D.C. Cir. 1982) (J. Ginsburg), a case closely analogous to ours, the D.C. Circuit addressed numerous consolidated challenges to EPA regulations that had been filed in circuit courts of appeals and district courts. The regulations did not establish any numerical limitations, but prescribed permitting procedures that constituted "a limitation on point sources and permit issuers and a restriction on the untrammeled discretion of the industry." *Id.* at 405 (internal quotation marks omitted). Following *E.I. du Pont*, the court held this "limitation" was sufficient to bring the regulations within the ambit of direct circuit court review under § 1369(b)(1)(E). Employing "a practical rather than a cramped construction," the court held that direct review in the circuit court was appropriate, even though the regulations did not impose technical requirements but were "far more general and rest[ed] dominantly on policy choices." *Id.* In fact, the court cited several reasons for concluding that such "broad, policy-oriented rules" are actually more suitable for direct circuit court review than "specific technology-based rules." *Id.* at 405 n.15. The court noted that *E.I. du Pont* "does not unequivocally dictate our result but [its] reasoning strongly supports our holding that we have jurisdiction." *Id.* at 406.

In *Virginia Elec. & Power Co. v. Costle*, 566 F.2d 446 (4th Cir. 1977) ("*VEPCO*"), the Fourth Circuit addressed consolidated petitions challenging EPA regulations prescribing requirements for the location, design, construction and capacity of cooling water intake structures used to withdraw from, rather than discharge into, covered waters. The challengers

argued that such requirements could not be "other limitations" under § 1369(b)(1)(E) until they were actually adopted in an individual permit proceeding. Because the requirements were not self-executing, the challengers argued they were only presumptively applicable and did not actually impose any limitation or restriction on point-source discharges. The court held the argument was foreclosed by *E.I. du Pont. VEPCO*, 566 F.2d at 449–50. The court held the requirement that certain information be considered in determining the best available technology for intake structures was a sufficient restriction on the discretion of point source operators and permit issuers to constitute an "other limitation" under subsection (E). *Id.* Further, citing *E.I. du Pont*, the court noted the regulations were so closely related to effluent limitations, that "it would be anomalous to have their review bifurcated between different courts." *Id.* at 450. The court held that circuit court review was proper under subsection (E), stating that "this result is consistent with the jurisdictional scheme of the Act, which in general leaves review of standards of nationwide applicability to the courts of appeals, thus furthering the aim of Congress to achieve nationally uniform standards." *VEPCO*, 566 F.2d at 451.

More recently, the Eighth Circuit followed suit. In *Iowa League of Cities v. U.S. E.P.A.*, 711 F.3d 844 (8th Cir. 2013), the court addressed two letters from the EPA sent to a senator and alleged to have effectively established new regulatory standards governing municipal water treatment processes. The court first noted that "the Supreme Court has recognized a preference for direct appellate review of agency action pursuant to the APA." *Id.* at 861 (citing *Fla. Power*, 470 U.S. at 745). The court rejected the

EPA's contention that the subject letters, couched in terms of what "should not be permitted" by regulated entities, did not "promulgate" a binding limitation. Noting that the EPA had characterized the letters as expressing its position or policy, the court dismissed the notion that the instruction was not binding as "Orwellian Newspeak." *Id.* at 865. The court did not cite *E.I. du Pont*, but adopted the *VEPCO* formulation of "limitation" and went on to hold that subsection (E) applies if "entities subject to the CWA's permit requirements face new restrictions on their discretion with respect to discharges or discharge-related processes." *Id.* at 866.

These decisions from the D.C., Fourth, and Eighth Circuits demonstrate courts' willingness to view *E.I. du Pont* as license to construe Congress's purposes in § 1369(b)(1) more generously than its language would indicate.[2] However, movants herein read *E.I. du Pont* differently. They argue *E.I. du Pont*'s holding is narrower and should be limited to its facts. In support they cite decisions from the Eleventh and Ninth Circuits refusing to find circuit court jurisdiction under subsection (E).

In both *Friends of the Everglades v. U.S. E.P.A.*, 699 F.3d 1280, 1287 (11th Cir. 2012), and *Northwest Environmental Advocates v. U.S. E.P.A.*, 537 F.3d

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[2] Most recently, the "functional approach" employed in these cases was applied by two district courts in relation to the Clean Water Rule in *this* litigation to find circuit court jurisdiction under subsection (E). *Murray Energy Corp. v. U.S. E.P.A.*, 2015 WL 5062506 (N.D. W.Va. Aug. 26, 2015); *State of Georgia v. McCarthy*, 2015 WL 5092568 at *2–3 (S.D. Ga. Aug. 27, 2015).

1006, 1015–16 (9th Cir. 2008), the courts reached *results* different from those reached in the D.C., Fourth, and Eighth Circuits. However, the decisions in all five circuits are readily reconcilable. In both *Friends of the Everglades* and *Northwest Environmental*, the courts acknowledged the above discussed *NRDC* and *VEPCO* rulings, but found the regulations before them materially distinguishable from those deemed to come within the scope of § 1369(b)(1)(E). Far from *restricting* "untrammeled discretion," the regulations at issue in *Friends of the Everglades* and *Northwest Environmental* actually created *exemptions* from limitations. Both courts concluded that an exemption from limitation simply cannot be fairly characterized as a limitation. Neither court criticized the approach adopted in *E.I. du Pont* and applied in *NRDC* and *VEPCO*. Nor did either court reject the notion that an "other limitation" can be made out by an indirect restriction on discretion. Rather, *Friends of the Everglades* and *Northwest Environmental* held that no construction could render an exemption from limitation what it plainly is not: a "limitation" under subsection (E).[3] The two lines of authority are therefore not inconsistent.

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[3] These authorities were cited as persuasive in *this* litigation by one district court. *North Dakota v. U.S. E.P.A.*, 2015 WL 5060744 at *2 (D. N.D. Aug. 27, 2015). However, the *North Dakota* court ignored the fact that, unlike the regulations at issue in those cases, the Clean Water Rule does not create an exemption. And despite noting the pertinence of the *NRDC-VEPCO-Iowa League* line of cases, the *North Dakota* court conspicuously ignored their holdings.

Here we acknowledge that the Rule is definitional only and does not *directly* impose any restriction or limitation. Yet, neither does the Rule create an exemption from limitation. By clarifying the definition of "waters of the United States," the Rule undeniably has the *indirect* effect of altering permit issuers' authority to restrict point-source operators' discharges into covered waters. The alteration invariably results in expansion of regulatory authority in some instances and imposition of additional restrictions on the activities of some property owners. These restrictions, of course, are presumably the reason for petitioners' challenges to the Rule. Hence, although the Rule is definitional in nature, it is undeniably, in the language of *E.I. du Pont*, a "basic regulation governing other individual actions issuing or denying permits." 430 U.S. at 136. To rule that Congress intended to provide direct circuit court review of such individual actions but intended to exclude from such review the definitional Rule on which the process is based, would produce, per *E.I. du Pont*, "a truly perverse situation." *Id.* To avoid just such an outcome, the *E.I. du Pont* Court reasoned that Congress must have intended that both types of regulation would be subject to review in the same forum, i.e., the circuit courts.[4]

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[4] *E.I. du Pont*'s analysis is also dispositive of movants' argument that review under subsection (E), by its terms, applies only to action by the EPA Administrator approving or promulgating a limitation "under section 1311, 1312, 1316, or 1345 of this title." Movants contend that all of these sections pertain to effluent limitations. Inasmuch as the Agencies do not even argue that the Clean Water Rule represents an effluent limitation,

E.I. du Pont is the last word from the Supreme Court on § 1369(b)(1)(E). It is still good law. Our sister courts in the D.C., Fourth, and Eighth Circuits have all applied *E.I. du Pont*'s approach and have defined the scope of direct circuit court review under subsection (E) more broadly than a strict interpretation of its language would indicate. The two circuit-level decisions, from the Ninth and Eleventh Circuits, that declined to find circuit court jurisdiction under subsection (E) did so in relation to agency action materially distinguishable from the Rule here at issue. The movants' position is thus devoid of substantial case law support. While their plain-language arguments are not without facial appeal, we are hardly at liberty to ignore the consistent body of case law that has sprung from that language in encounters with the real world. In response to concern about producing a "perverse situation" seemingly at odds with congressional purpose, movants have no answer beyond their argument that Congress must be held to say what it means and mean what it says. Were we writing on a blank slate, the argument would be more persuasive, but we're not. As an "inferior court," we are obliged to take our lead from

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movants contend the Rule cannot be deemed to have been promulgated under any of these sections.

Yet, the Rule purports to be adopted under authority, *inter alia*, of section 311 (33 U.S.C. § 1311). 80 Fed. Reg. at 37,055. And subsection (E) prescribes direct circuit court review of any "other limitation," in addition to any effluent limitation. It follows that the Rule, representing an "other limitation" as defined in *E.I. du Pont* and its progeny, and adopted pursuant to § 1311, comes within the scope of circuit court review under § 1369(b)(1)(E).

the Supreme Court. Having discerned no persuasive grounds to depart from the rationale that controlled in *E.I. du Pont*, I conclude that we, like our sister circuits, must follow its lead.

Viewing the Clean Water Rule through the lens created in *E.I. du Pont* reveals a regulation whose practical effect will be to *indirectly* produce various limitations on point-source operators and permit issuing authorities. Accordingly, although the Rule does not itself impose any limitation, its effect, in the regulatory scheme established under the Clean Water Act, is such as to render the Rule, per the teaching of *E.I. du Pont* and its progeny, subject to direct circuit court review under § 1369(b)(1)(E).

2. Subsection (F)—"Issuing or Denying Permit"

Evaluation of the second claimed basis for direct circuit court review proceeds in like manner. Movants argue that § 1369(b)(1)(F) does not justify jurisdiction in the circuit court because the Clean Water Rule is not an action of the EPA Administrator "in issuing or denying a permit." Yet, in relation to subsection (F), too, the Supreme Court has opened the door to constructions other than a strict literal application. In *Crown Simpson Pulp Co. v. Costle*, 445 U.S. 193, 196-97 (1980), the Court reversed the Ninth Circuit and held that an action of the Administrator "functionally similar" to denial of a permit is encompassed within subsection (F). If the "precise effect" of the action would be to deny a permit, the Court reasoned, it would be irrational to conclude, based on a strictly literal application of subsection (F), that the action would be subject to review in district court rather than circuit court. The Court rec-

ognized that direct review in the circuit court "would best comport with the congressional goal of ensuring prompt resolution of challenges to EPA's actions." *Id.* at 196. Addition of another level of judicial review, the Court observed, "would likely cause delays in resolving disputes under the Act." *Id.* at 197. In conclusion, the Court remarked: "Absent a far clearer expression of congressional intent, we are unwilling to read the Act as creating such a seemingly irrational bifurcated review system." *Id.*

Here, similarly, the Agencies contend that the effect of the Clean Water Rule, operating in the extant regulatory scheme, is to impact permitting requirements, thereby affecting the granting and denying of permits. This is enough, the Agencies argue, to bring the Clean Water Rule within the ambit of subsection (F), because it too impacts permitting requirements. In support they cite a Sixth Circuit case, *Nat'l Cotton Council v. U.S. E.P.A.*, 553 F.3d 927, 933 (6th Cir. 2009), *cert. denied sub nom. Crop Life v. Baykeeper*, 130 S.Ct. 1505 (2010), and *Am. Farm Bureau Fed'n v. Baykeeper*, 130 S.Ct. 1505 (2010). In *National Cotton*, this court held that subsection (F) authorizes direct circuit court review not only of actions issuing or denying particular permits, but also of regulations governing the issuance of permits. The court relied on authorities from the Ninth Circuit and D.C. Circuit stemming from *E.I. du Pont* and *Crown Simpson*. *See Nat. Res. Def. Council, Inc. v. U.S. E.P.A.*, 966 F.2d 1292, 1296–97 (9th Cir. 1992); *Am. Mining Cong. v. U.S. E.P.A.*, 965 F.2d 759, 763 (9th Cir. 1992); *Nat. Res. Def. Council, Inc. v. U.S. E.P.A.*, 656 F.2d 768, 775 (D.C. Cir. 1981). In fact, the *National Cotton* court noted that this more expansive reading of subsection (F) encompassed even regulations that

exempted certain discharges from permitting requirements. *Nat'l Cotton*, 553 F.3d at 933. That is, under subsection (F), a regulation that imposes no restriction or limitation is reviewable in circuit court, so long as it affects permitting requirements.[5]

Movants maintain that a mere impact on permitting requirements is not enough to bring the Rule within subsection (F). They contend the holding of *Crown Simpson*'s expansion of the plain language of the provision is really quite narrow and that *National Cotton*'s reading of subsection (F) is overly broad and even inconsistent with *Crown Simpson*. They contend the "precise effect" of the Clean Water Rule is *not* to deny any permit and that it is therefore not "functionally similar."

Movants attack *National Cotton* on several fronts. First, they contend the decision is not entitled to precedential weight because its determination of jurisdiction was summary in nature and devoid of substantive analysis. In support they cite *Emswiler v. CSX Transportation, Inc.*, 691 F.3d 782, 788–90 (6th Cir. 2012), for the proposition that "drive-by jurisdictional rulings" based on "less than meticulous" reasoning should be accorded no precedential effect. *Emswiler* is inapposite. The *Emswiler* court used these characterizations in relation to an opinion's careless characterization of a party's failure to meet a threshold exhaustion requirement as depriving the

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[5] *National Cotton* was followed in *this* litigation in *Murray Energy*, 2015 WL 5062506 at *5–6, the court noting there was no dispute that the Clean Water Rule will have an impact on permitting requirements.

court of subject matter jurisdiction. While the failure to exhaust impacted the plaintiff's ability to win relief on the merits, the *Emswiler* court called it "less than meticulous" to say the failure to exhaust deprived the court of subject matter jurisdiction. *Id.* at 789. The *National Cotton* jurisdictional ruling was not the product of carelessness. It is succinct because it efficiently follows the holdings of several other rulings—one by the Supreme Court—whose reasoning it implicitly incorporated by citing them.

Granted, the Eleventh Circuit expressly declined to follow *National Cotton* in *Friends of the Everglades*, 699 F.3d at 1288, rejecting the position that *Crown Simpson* legitimized direct circuit court review of any "regulations relating to permitting itself." The court noted that, although the Sixth Circuit adopted that interpretation in *National Cotton*, it did so in reliance on two Ninth Circuit cases that had since been distinguished by the Ninth Circuit in *Northwest Environmental*, 537 F.3d at 1016–18. In *Northwest Environmental*, 537 F.3d at 1018, as in *Friends of the Everglades*, 699 F.3d at 1288, the court ruled that a regulation creating a permanent exemption from the permitting process could not have the effect of granting or denying a permit reviewable under § 1369(b)(1)(F) precisely because the regulation *excluded* certain discharges from the permitting process altogether.

Yet, even if it be conceded that *National Cotton* said too much when it noted in *dicta* that the Ninth Circuit had construed subsection (F) broadly enough to include an exemption from regulation, the fact remains that the action here under review is not an exemption. Rather, both petitioners and the Agencies operate on the understanding that the effect of

the Clean Water Rule is not solely to exclude waters from protection, but to extend protection to some additional waters. This extension indisputably expands regulatory authority and impacts the granting and denying of permits in fundamental ways. The later clarification of Ninth Circuit law noted in *Friends of the Everglades* does not, therefore, in any way undermine the authority of *National Cotton* as applied to the Clean Water Rule.

Finally, movants contend *National Cotton* is wrongly decided. They contend that *Crown Simpson*'s expanded construction of subsection (F) was narrow and circumscribed; whereas *National Cotton*'s holding that subsection (F) authorizes circuit court review of "regulations governing the issuance of permits" is unduly broad. Perhaps. Yet, if we believed *National Cotton* was not distinguishable and was wrongly decided, we would still not be free to reject its holding. Generally, in a multi-circuit case where a question of federal law is at issue, the transferee court is obliged to follow its own interpretation of the relevant law. *See Murphy v. FDIC*, 208 F.3d 959, 964–65 (11th Cir. 2000) (citing *In re Korean Airlines Disaster*, 829 F.2d 1171, 1175–76 (D.C. Cir. 1987), and observing that other circuits have uniformly agreed with the D.C. Circuit). Moreover, no other court has held that *National Cotton* was wrongly decided. *National Cotton*, as well as the Ninth Circuit and D.C. Circuit authorities on which it relied, are still good law. Movants have not identified any materially contrary authority.

Furthermore, *National Cotton*'s construction is consistent with congressional purpose, which appears to have been the guiding light in both *E.I. du Pont* and *Crown Simpson*. In *Florida Power*, 470

U.S. at 744–45, in relation to the Atomic Energy Act, the Court recognized that "one crucial purpose" of statutes providing for direct circuit court review of agency action is judicial economy. *Id.* at 744. The Court noted that the district court's superior fact-finding capacity is typically unnecessary to judicial review of agency action. On the other hand, providing for initial review in the district court has the negative effect of "requiring duplication of the identical task in the district court and in the court of appeals; both courts are to decide, on the basis of the record the agency provides, whether the action passes muster under the appropriate APA standard of review." *Id.* The Court acknowledged that the intent of Congress, not the Court's concept of sound policy, is ultimately determinative, but concluded:

> Absent a firm indication that Congress intended to locate initial APA review of agency action in the district courts, we will not presume that Congress intended to depart from the sound policy of placing initial APA review in the courts of appeals.

Id. at 746. *See also Tennessee v. Herrington*, 806 F.2d 642, 650 (6th Cir. 1986) (following *Florida Power* and noting that where Congress has provided for direct circuit court review but its intent is ambiguous in a specific case, policy considerations are relevant); *Natural Resources Def. Council v. Abraham*, 355 F.3d 179, 193 (2d Cir. 2004) (citing cases from Second, Seventh, Tenth and D.C. Circuits for the proposition that "when there *is* a specific statutory grant of jurisdiction to the court of appeals, it should be construed in favor of review by the court of appeals.").

National Cotton's broader reading of subsection (F) is thus consistent with the preference in favor of circuit court review recognized in *Florida Power* and implicitly at work in both *E.I. du Pont*, *see* 430 U.S. at 128 (characterizing it as "almost inconceivable that Congress would have required duplicate review in the first instance by different courts"), and *Crown Simpson*, *see* 445 U.S. at 196–97 (noting unwillingness to conclude Congress intended to cause delays that would result from duplicative review process).

In *Florida Power*, the Court overruled Justice Stevens' objection that proper deference to Congress required enforcement of "the plain and simple construction of the statutory language." *Id.* at 750. Justice Stevens' plain-language position, like that of movants in this case, is not devoid of logic. Yet, as Justice Stevens protested, the Court rejected it as a matter of mere "semantic quibbles." *Id.* We do not view movants' plain-language arguments as semantic quibbles, but, in my view, they have clearly failed to identify any *substantial* reason to conclude the preference favoring direct circuit court review—created by Congress in § 1369(b)(1) and honored by the Supreme Court—does not, in this case, ultimately serve all parties' interests in efficiency, judicial economy, clarity, uniformity and finality.

Florida Power, like *E.I. du Pont* and *Crown Simpson*, demonstrates a strong preference for construing Congress's provision for direct circuit court review of agency action by a practical, functional approach rather than a technical approach. A holding that we have jurisdiction to hear the instant petitions for review of the Clean Water Rule is consistent with this understanding. On the other hand, a contrary ruling, though facially consonant with the plain

language of § 1369(b)(1), finds practically no solid support in the case law. Accordingly, I conclude that we have jurisdiction under subsection (F) as well.

C. Miscellaneous Objections

Movants present arguments based on other statutory provisions, items of legislative history and canons of construction. The arguments are not persuasive. That the Clean Water Rule was promulgated jointly by the EPA Administrator *and* the Secretary of the Army does not defeat the fact that it represents action, in substantial part, of the Administrator. The items of legislative history identified by the parties and said to be probative of congressional intent are sparse and frankly shed little light on the specific jurisdictional questions before the court. *See E.I. du Pont*, 430 U.S. at 133 (dismissing arguments based on other provisions of the statute and legislative history as inconclusive and not deserving of detailed discussion). Similarly, the various canons of construction alluded to by the parties are inconclusive and carry little weight in comparison with the dispositive considerations, as defined in the foregoing discussion of the guiding case law.

Movants also raise what they characterize as "due process concerns." They contend that if circuit court jurisdiction is exercised under § 1369(b)(1), then any other challenges to the Clean Water Rule not made within 120 days after its promulgation are foreclosed unless based on grounds which arose after the 120th day, per § 1369(b)(2). If subsequent as-applied challenges are thus deemed precluded, then unwary point-source operators and landowners uncertain about the scope of the Clean Water Act's regulatory reach may be subject to enforcement actions

and penalties without fair notice of the conduct prohibited. In *Longview Fibre Co. v. Rasmussen*, 980 F.2d 1307, 1313 (9th Cir. 1992), the Ninth Circuit referred to this preclusive effect as a "peculiar sting."

The concern is speculative and overblown in this case. If the court exercises jurisdiction over petitioners' instant challenges to the validity of the Rule in this nationwide multi-circuit case and upholds the Rule, then that determination *should* have preclusive effect. *See Narragansett Elec. Co. v. U.S. E.P.A.*, 407 F.3d 1, 5 (1st Cir. 2005) (noting that "the short time frame in § 1369(b) clearly reflects some effort to protect the EPA's interests in finality in certain matters, particularly certain rulemakings with substantial significance and scope."). On the other hand, this court's exercise of jurisdiction and ruling on a challenge to the *validity* of the Rule would not preclude challenge to subsequent *application* of the Rule in a particular permitting requirement or enforcement action. *See Decker v. Nw. Envtl. Def. Ctr.*, 133 S.Ct. 1326, 1335 (2013) (noting that whereas a challenge to the validity of regulations would be subject to the exclusive jurisdictional bar of § 1369(b)(2), an enforcement action would not be). To the extent our eventual ruling on the validity of the Rule might conceivably be asserted in overbroad fashion as barring a defense against application of the Rule in an enforcement action, the asserted bar would be subject to testing as excessive and unfairly prejudicial in that action. *See Nat. Res. Def. Council v. U.S. E.P.A.*, 673 F.3d 400, 407 (D.C. Cir. 1982) (rejecting the same "due process" argument and suggesting that overbroad application of the § 1369(b)(2) bar could be challenged, when ripe, as unconstitutional).

We therefore reject movants' "due process concerns" as premature and unfounded.

III. CONCLUSION

Both sides have presented worthy arguments in support of their respective positions on jurisdiction. Since enactment of the Clean Water Act in 1972, the jurisdictional provisions of § 1369(b)(1)(E) and (F) have been subjected to judicial scrutiny in relation to various regulatory actions and have been consistently construed not in a strict literal sense, but in a manner designed to further Congress's evident purposes. Pursuant to the uniform trend of the instructive case law, the scope of direct circuit court review has gradually expanded. In response, Congress has not moved to amend the provision or otherwise taken "corrective" action. As explained above, the instant petitions for review of the Clean Water Rule come within the scope of subsections (E) and (F), as they have come to be defined in the governing case law. Movants have failed to identify any particular circumstances or practical considerations that would justify holding that adjudication of the instant petitions for judicial review in the various district courts would better serve Congress's purposes. Instead, recognition of our authority and our duty to directly review the Clean Water Rule in this multi-circuit case is in all respects consonant with the governing case law and in furtherance of Congress's purposes. Conversely, to rule that we lack jurisdiction would be to contravene prevailing case law and frustrate congressional purposes without substantial justification.

We hold that jurisdiction is properly laid in this court. All pending motions to dismiss are **DENIED**.

CONCURRING IN THE JUDGMENT

GRIFFIN, *Circuit Judge*, concurring in the judgment, only.

I concur in the judgment holding that we possess subject-matter jurisdiction in this case; thus, I join in denying petitioners' motions to dismiss. However, I do so only because I am required to follow our precedentially-binding decision, *National Cotton Council of America v. U.S. E.P.A.*, 553 F.3d 927 (6th Cir. 2009). Were it not for *National Cotton*, I would grant the motions to dismiss.

I.

Congress establishes the jurisdiction of the courts of appeals and other inferior courts. *See, e.g.*, *Kontrick v. Ryan*, 540 U.S. 443, 452 (2004). In determining whether the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, creates jurisdiction in our court over a case or controversy, we must examine and apply the terms of the statute enacted by Congress. As with all matters of statutory construction, we should apply a textualist, not a "functional" or "formalistic," approach.[1]

[1] With a heavy heart, I acknowledge the sudden passing of Justice Antonin Scalia. Justice Scalia was the founder and champion of the modern textualist mode of constitutional and statutory construction. His essay, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997), and other writings and opinions profoundly influenced a generation of attorneys, legal

In this regard, "[i]t is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the lawmaking body which passed it, the sole function of the courts is to enforce it according to its terms." *Caminetti v. United States*, 242 U.S. 470, 485 (1917). "If the words are plain, they give meaning to the act, and it is neither the duty nor the privilege of the courts to enter speculative fields in search of a different meaning." *Id.* at 490. Recognizing the consequences of unbridled judicial forays into the legislative sphere, the Supreme Court has admonished "'time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.'" *Arlington Cent. Sch. Dist. Bd. of Ed. v. Murphy*, 548 U.S. 291, 296 (2006) (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992)). Accordingly, "[w]hen the statutory language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Id.* (internal citations and quotation marks omitted).

Whether it is desirable for us to possess jurisdiction for purposes of the efficient functioning of the judiciary, or for public policy purposes, is not the issue. Rather, the question is whether Congress in fact created jurisdiction in the courts of appeals for this case. I conclude that it did not.

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scholars, and judges. Justice Scalia's legacy will live on for decades in countless opinions such as this one.

The Environmental Protection Agency and the U.S. Army Corps of Engineers ("the Agencies") argue that both 33 U.S.C. § 1369(b)(1)(E) and (F) vest this court with jurisdiction regarding petitioners' claims. In my view, it is illogical and unreasonable to read the text of either subsection (E) or (F) as creating jurisdiction in the courts of appeals for these issues. Nonetheless, because *National Cotton* held otherwise with respect to subsection (F), I concur in the judgment, only.

II.

Subsection (E) creates jurisdiction to review an action "approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title[.]" Sections 1311 and 1312 specifically set forth effluent limitations and water quality related-effluent limitations. Sections 1316 and 1345 provide additional limitations on discharges and sewage sludge to achieve state water quality standards when those in sections 1311 and 1312 fall short. The Act defines "effluent limitation" as expressly relating to *discharges*:

> The term "effluent limitation" means any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are *discharged* from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.

§ 1362(11) (emphasis added). It does not define "other limitation."

Petitioners ask that we draw an associational link between effluent and other limitations, directing this court to a Fourth Circuit case that speaks in terms of an "other limitation" being "closely related" to "effluent limitations," *Va. Elect. & Power Co. v. Costle*, 566 F.2d 446, 450 (4th Cir. 1977) ("*VEPCO*"), and to a Seventh Circuit case holding that "other limitation" is "restricted to limitations directly related to effluent limitations." *Am. Paper Inst., Inc. v. U.S. E.P.A.*, 890 F.2d 869, 877 (7th Cir. 1989). On the other hand, the Agencies advocate for—and the lead opinion applies—a broad reading of "other limitation"; that is, "other limitation" includes "restrictions that are *not* effluent limitations."

In my view, both are wrong. Whatever the relationship may be between effluent and other limitations, the plain text of subsection (E) clearly delineates what the limitations are, and what they are not: the "limitations" set forth in §§ 1311, 1312, 1316, and 1345 provide the boundaries for what constitutes an effluent or other limitation. The statutory interpretation canon, *noscitur a sociis*, drives this point home. Simply, "a word is known by the company it keeps" to "avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress." *Yates v. United States*, 135 S. Ct. 1074, 1085 (2015) (citation omitted). Application of this canon is simple: "any effluent limitation or other limitation" must be related to the statutory boundaries set forth in §§ 1311, 1312, 1316, and 1345.

The problem with the boundaries for the Agencies is that the definitional section the Clean Water Rule modifies—"[t]he term 'navigable waters' means the waters of the United States, including the terri-

torial seas"—does not emanate from these sections. It is a phrase used in the Act's definitional section, § 1362, and no more. But the definitional section is not mentioned in § 1369, let alone the specific sections listed in subsection (E). And the definitional section, as the lead opinion acknowledges, is not self-executing; at best, it operates in conjunction with other sections scattered throughout the Act to define when its restrictions even apply. Accordingly, the lack of any reference to § 1362 in subsection (E) counsels heavily against a finding of jurisdiction. *See Friends of Earth v. U.S. E.P.A.*, 333 F.3d 184, 189 (D.C. Cir. 2003) ("[T]he courts of appeals have consistently held that the express listing of specific EPA actions in section 1369(b)(1) precludes direct appellate review of those actions not so specified."); *Longview Fibre Co. v. Rasmussen*, 980 F.2d 1307, 1313 (9th Cir. 1992) ("It would be an odd use of language to say 'any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title' in § 1369(b)(1)(E) if the references to particular sections were not meant to exclude others.").

The Agencies' response to this textual point is underwhelming, raising suppositional and policy arguments. First, the Agencies contend that they promulgated the Clean Water Rule *only* under the *effluent limitations* provision codified at § 1311. Section 1311 makes the unauthorized "discharge of any pollutant by any person . . . unlawful." § 1311(a). The phrase "discharge of any pollutant" is defined, as pertinent here, as "any addition of any pollutant to navigable waters from any point source." § 1362(12)(A). The Agencies concede that "[t]he plain text reading of the phrase 'other limitation under sections 1311, 1312, 1316, or 1345' . . . *can only refer*

to limitations that are promulgated under the specified sections but are not effluent limitations." (Emphasis added.) They then suppose in circular fashion that "[b]y defining what waters are 'waters of the United States,' the Clean Water Rule establishes where the Act's prohibitions and requirements apply."

This may be true, but it fails muster on the point of whether the Clean Water Rule is any "other limitation" within the meaning of § 1311. Importantly, neither the Agencies nor the lead opinion have identified a specified subsection within § 1311 that are "not effluent limitations" under which the Agencies promulgated the Clean Water Rule. This is because they cannot. Waters of the United States applies across the Act, not just to those discharge limitations set forth in § 1311. The Clean Water Rule is not a "limitation" on the discharge of pollutants *into* waters of the United States; rather, it sets the jurisdictional reach for whether the discharge limitations even apply in the first place. In the Agencies' own words:

> The action imposes no enforceable duty on any state, local, or tribal governments, or the private sector, and does not contain regulatory requirements that might significantly or uniquely affect small governments.

Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054, 37,102 (June 29, 2015) (to be codified at 33 C.F.R. pt. 328 and 40 C.F.R. pts. 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401). In short, I refuse to read § 1369's narrow jurisdictional authorization in such a circular

fashion, expansively turning the broadening of the Act's jurisdiction into a limitation that may be imposed *only when jurisdiction is appropriate. Cf. North Dakota v. U.S. E.P.A.*, —F. Supp. 3d—, 2015 WL 5060744, at *2 (D.N.D. Aug. 27, 2015) ("[T]he States have exactly the same discretion to dispose of pollutants into the waters of the United States after the Rule as before.").

Second, the Agencies raise policy considerations as to why review of such a nationally important rule should originate in the courts of appeals. They argue, for example, that the definition of waters of the United States is a "fundamental" and "basic regulation" pertinent to the Act's backbone—its prohibition against discharging pollutants into such waters without a permit. The Agencies also argue initial review in the district courts will inevitably lead to waste of judicial and party resources, delays, and possibly even different results.

However, no matter how important a policy prerogative may be, the Act's plain and unambiguous text binds this court. That text stands in marked contrast to the Clean Air Act's express authorization to challenge "any other nationally applicable regulations" by the EPA in the D.C. Circuit. *See* 42 U.S.C. § 7607(b)(1); *Am. Paper Inst.*, 890 F.2d at 877 ("Congress could easily have provided jurisdiction . . . by providing a general jurisdiction provision in the Act. Instead, Congress specified those EPA activities that were directly reviewable by the court of appeals.") (internal citation omitted). And that text makes clear that this court does not have jurisdiction to hear a challenge to a regulation that does not impose any limitation as set forth by the Act.

The lead opinion departs from the Act's plain text by relying on a string of cases it contends encourages a function-over-form approach to subsection (E). *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112 (1977), we are told, broadly interprets the Act's jurisdictional authorization to prevent the "truly perverse situation" where the courts of appeals review actions issuing or denying permits, but not the "basic regulations governing those individual actions." I agree that *E.I. du Pont* speaks to such policy considerations, but disagree that such policy considerations drove the Court's analysis.

In *E.I. du Pont*, the Supreme Court considered effluent limitation regulations promulgated by the EPA for discharges by the inorganic chemical industry. *Id.* at 122–24. The primary issue was whether the Act granted the EPA the power to set effluent limitations by regulation (thereby falling within subsection (E)) or by guideline (thereby falling outside subsection (E)). *Id.* at 124–25. "Thus the issue of jurisdiction to review the regulations [was] intertwined with the issue of [the] EPA's power to issue the regulations." *Id.* at 125. After resolving the "critical question [of] whether [the] EPA has the power to issue effluent limitations by regulation" in the EPA's favor based on the statute's text and legislative history, *id.* at 124, 126–36, the Court plainly noted that its holding that the Act "authorize[d] the [EPA] to promulgate effluent limitations [by regulation] for classes and categories of existing point sources *necessarily resolve[d] the jurisdictional issue* as well." *Id.* at 136 (emphasis added).

Yet, the lead opinion draws its "functional" "lens" from *E.I. du Pont*'s subsequent discussion as to why it rejected the industry's argument that subsection

(E)'s reference to § 1311 (the effluent limitations provision) "was intended only to provide for review of the grant or denial of an individual variance" from the Act's effluent limitations restriction. *Id.* Among other reasons, the Court found this argument unpersuasive because the industry's "construction would produce the truly perverse situation in which the court of appeals would review numerous individual actions issuing or denying permits . . . but would have no power of direct review of the basic regulations governing those individual actions." *Id.* This policy reason came *after* a plain textual rejection of the industry's position. *Id.* It is, therefore, a far stretch to take this dicta and expand it as the lead opinion does to find jurisdiction proper when a regulation's "practical effect" only sets forth "indirect" limits. And, unlike in *E.I du Pont*, the Agencies here admit they have not promulgated an effluent limitation. I therefore decline to read *E.I. du Pont*, as the lead opinion does, as shoehorning an exercise in jurisdictional line-drawing into subsection (E)'s "other limitation" provision.

To the extent policy considerations are responsible for *E.I. du Pont*'s outcome, I disagree that, to borrow the lead opinion's phrase, such "real world" considerations mandate a watered-down version of textualism in this case, erroneously elevating the perceived congressional purpose over the statutory language. As the Supreme Court emphasized just last year, "[o]ur job is to follow the text even if doing so will supposedly 'undercut a basic objective of the statute.'" *Baker Botts L.L.P. v. ASARCO LLC*, 135 S. Ct. 2158, 2169 (2015) (citation omitted). Thus, when presented with "the clear meaning of the text, there is no need to . . . consult the [statute's] purpose. . . .

[I]t is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 167–68 (2004) (citation omitted and second alteration in original). Put differently, unambiguous text trumps policy considerations. *See Kloeckner v. Solis*, 133 S. Ct. 596, 607 n.4 (2012) ("[E]ven the most formidable argument concerning the statute's purposes could not overcome the clarity we find in the statute's text."); *Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702, 1710 (2012) ("[N]o legislation pursues its purposes at all costs, and petitioners' purposive argument simply cannot overcome the force of the plain text.") (internal citation omitted); *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 261 (1993) ("[V]ague notions of a statute's 'basic purpose' are nonetheless inadequate to overcome the words of its text regarding the *specific* issue under consideration."). As set forth, subsection (E)'s language could not be clearer, thus removing policy considerations from this court's analytical quiver.

Circuit case law drawing on this "functional approach" similarly misses the mark. Notably, *VEPCO* appears to define "limitation" as "a restriction on the untrammeled discretion of the industry which was the condition prior to the [Act's] passage." 566 F.2d at 450. Other cases relied upon by the lead opinion have followed this analysis. *See, e.g., Iowa League of Cities v. U.S. E.P.A.*, 711 F.3d 844, 866 (8th Cir. 2013); *Nat. Res. Def. Council, Inc. v. U.S. E.P.A.*, 673 F.2d 400, 405 (D.C. Cir. 1982) ("*NRDC II*"). However, *VEPCO*'s statement requires context.

The regulation at issue in *VEPCO* governed the "structures used to withdraw water for cooling purposes." 566 F.2d at 446–51. It did "not impose specif-

ic structural or locational requirements upon cooling water intake structures," and instead just "require[d] that the location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact." *Id.* at 450. Because the regulation mandated the consideration of certain information in constructing intake structures, the Fourth Circuit reasoned, that "in itself [was] a limitation on point sources and permit issuers" and therefore restricted "the untrammeled discretion of the industry." *VEPCO* also drew from *E.I. du Pont*, reasoning that the regulation issued there was "so closely related to the effluent limitations and new source standards of performance . . . that . . . it would be anomalous to have their review bifurcated between different courts." *Id.* (*citing E.I. du Pont*, 430 U.S. at 136).

At most, *VEPCO* is an example of what constitutes an "other limitation"—a restriction on the industry's abilities to intrude upon the waters of the United States without the Agencies' permission to do so. In this regard, the Fourth Circuit's "untrammeled discretion" language makes absolute sense, but I disagree with the lead opinion's reliance upon this language here. The *Act* in and of itself restricts the industry's untrammeled discretion. I see no textual indication that Congress intended *any* restriction on the industry to be directly reviewed by the courts of appeals, yet under the lead opinion's reading, *any* industry restriction requires review here. The lead opinion's application thus swallows the rule.

Finally, that the Clean Water Rule arguably expands the Act's jurisdiction cannot be a reason to

find a functional limitation under subsection (E). The lead opinion hangs its "functional" premise on the fact that the Clean Water Rule is a "basic regulation" affecting the Act's core, defining where it applies and where it does not. It presumes, perhaps rightly so, that the Clean Water Rule "results in [an] expansion of regulatory authority in some instances and impos[es] . . . additional restrictions on the activities of some property owners." However, I cannot agree that the latter supports the former in concluding that the Clean Water Rule "has the *indirect* effect of altering permit issuers' authority to restrict point-source operators' discharges into covered waters." A plausible hypothetical removes the linchpin in this analysis. Suppose instead of taking a flow-like approach to the Act's jurisdiction, the Agencies—perhaps under a different administration—promulgate a rule that ebbs toward a more restricted view, consistent with the plurality opinion in *Rapanos v. United States*, 547 U.S. 715 (2006). Under the lead opinion's analysis, a rule *narrowing* the scope of the waters of the United States would *also* be an "other limitation" sufficient to trigger our jurisdiction because it too would indirectly affect point-source operators and permit issuing authorities, albeit in a less restrictive manner. Congress could not have intended such a nonsensical result.

For these reasons, I cannot conclude that subsection (E) authorizes our jurisdiction.

III.

Second, the lead opinion concludes we have jurisdiction to hear petitioners' challenges under subsection (F). I agree, but for different reasons. Specifically, while I agree that *National Cotton* controls

this court's conclusion, I disagree that it was correctly decided. But for *National Cotton*, I would find jurisdiction lacking. I therefore concur in the judgment, only.

Section 1369(b)(1)(F) provides exclusive jurisdiction in this court to review an action "issuing or denying any permit under section 1342, [the National Pollutant Discharge Elimination System ("NPDES")]." On its face, subsection (F) clearly does not apply to the Clean Water Rule's promulgation. *See Rhode Island v. U.S. E.P.A.*, 378 F.3d 19, 23 (1st Cir. 2004) ("By its plain terms, [subsection (F)] conditions the availability of judicial review on the issuance or denial of a permit."). Under a plain text reading, the Clean Water Rule neither issues nor denies a permit under the NPDES. In my view, this should end the analysis. I am, however, constrained by our court's precedent holding that "issuing or denying any permit" means more than just that.

As the lead opinion correctly notes, several courts have deviated from a strict reading of the jurisdictional language and toward a more "functional" approach. In *Crown Simpson Pulp Company v. Costle*, for example, the Supreme Court blessed jurisdiction in the courts of appeals when the EPA's action—there, vetoing California's proposal to grant permits for pulp mills to discharge pollutants into the Pacific Ocean—had the "precise effect" of denying a permit. 445 U.S. 193, 196 (1980). In other words, jurisdiction was proper because the EPA's action was "functionally similar to its denial of a permit in States which do not administer an approved permit-issuing program." *Id.* A contrary ruling, held the Supreme Court, would lead to an "irrational bifurcated system" depending upon "the fortuitous cir-

cumstance of whether the State in which the case arose was or was not authorized to issue permits." *Id.* at 196–97. Both the D.C. Circuit, *Nat. Res. Def. Council, Inc. v. U.S. E.P.A.*, 656 F.2d 768, 776 (D.C. Cir. 1981) ("*NRDC I*"); *NRDC II*, 673 F.2d at 405 (then-Judge Ginsburg's "practical rather than a cramped construction" counsel), and the Ninth Circuit, *Am. Mining Congress v. U.S. E.P.A.*, 965 F.2d 759 (9th Cir. 1992), *Nat. Res. Def. Council, Inc., v. U.S. E.P.A.*, 966 F.2d 1292, 1297 (9th Cir. 1992) ("*NRDC III*"), *Nat. Res. Def. Council v. U.S. E.P.A.*, 526 F.3d 591, 601 (9th Cir. 2008) ("*NRDC IV*"), have similarly adopted a functional approach to jurisdiction under subsection (F).

I depart ways with the lead opinion at the breadth with which it reads *Crown Simpson*. As the Ninth Circuit made clear in *Northwest Environmental Advocates v. U.S. E.P.A.*, "[t]he facts of [*Crown Simpson*] make clear that the Court understood functional similarity in a narrow sense." 537 F.3d 1006, 1016 (9th Cir. 2008). The Supreme Court was clearly concerned with a rigid construction of "issuing or denying" given the factual circumstances of *Crown Simpson*—*i.e.*, had the EPA not delegated California the authority to designate NPDES permits, it would have had the power to grant or deny permits directly (thus explaining the "perverse" result rationale). With this factual overlay, the Court's "precise effect" exception makes sense.

That exception simply does not apply here. We have underscored that the text matters when interpreting the jurisdictional grant of § 1369(b)(1). *See Lake Cumberland Trust, Inc. v. U.S. E.P.A.*, 954 F.2d 1218, 1221–24 (6th Cir. 1992) (noting the textual distinctions between subsections (E) and (G) to find no

jurisdiction). It is also not lost on me that *National Cotton* itself purported to accentuate § 1369(b)(1)'s narrowness. 553 F.3d at 933 ("Congress did not intend court of appeals jurisdiction over all EPA actions taken pursuant to the Act."). It stretches the plain text of subsection (F) to its breaking point to hold that a definition setting the Act's boundaries has, under *Crown Simpson*, the "precise effect" of or is "functionally similar" to, approving or denying a NPDES permit. At best, the Clean Water Rule is one step removed from the permitting process. It informs whether the Act requires a permit in the first place, not whether the Agencies can (or will) issue or deny a permit.

Two other points buttress my problem with jurisdiction here. First, the Clean Water Rule applies across the entire Act, and not just with respect to the NPDES permitting process. This is particularly true when considering the fact that the Clean Water Rule's expansive definition also applies to the provision of the Act—§ 1344—requiring the Corps to issue permits for dredged or fill material. Section 1344, however, is not mentioned in subsection (F), only § 1342 is. Second, the Agencies' own argument as to why they contend the Clean Water Rule constitutes "issuing or denying any permit" shows why there are problems with extending jurisdiction to cover the Clean Water Rule. By suggesting that the Clean Water Rule identifies what waters will and will not require permitting under NPDES, they have therefore identified situations—*i.e.*, not waters of the United States—where there would never be permit decisions in the first place to be reviewed by the courts of appeals. *See Nw. Envtl. Advocates*, 537

F.3d at 1018; *Friends of the Everglades*, 699 F.3d at 1288.

Although not bound by *Crown Simpson* and the other cases cited by the lead opinion, *National Cotton* dictates my conclusion. There, we extended jurisdiction under subsection (F) when a rule "regulates the permitting procedures." 553 F.3d at 933. At issue in *National Cotton* was an EPA rule exempting certain pesticides from the NPDES permitting requirements. *Id.* at 929. In expanding subsection (F)'s jurisdictional authorization, our court relied upon statements by the Ninth Circuit in *American Mining Congress* and *NRDC III* extending jurisdictional review from the "issuance or denial of a particular permit" to "the regulations governing the issuance of permits" and the "rules that regulate the underlying permit procedures." *Id.* at 933 (citations omitted).

National Cotton's jurisdictional reach, in my view, has no end. Indeed, the lead opinion even acknowledges that *National Cotton* holds "a regulation that imposes no restriction or limitation is reviewable in circuit court, so long as it affects permitting requirements." It is a broad authorization to the courts of appeals to review *anything* relating to permitting notwithstanding the statutory language to the contrary.

Moreover, the Ninth Circuit has subsequently rolled back the two cases relied upon by *National Cotton* to broadly interpret subsection (F), *American Mining Congress* and *NRDC III*. *See Nw. Envtl. Advocates*, 537 F.3d at 1018. It also drew a line between statutory exemptions and permitting procedures, noting that a regulation granting a statutory exemption necessarily meant that the courts of ap-

peals would "never have to consider on direct review an action involving the denial of an NPDES permit for pollutant discharges" and thus there was no danger of the "awkward[]" and bifurcated review problem described in *NRDC I*. *Id.* at 1018 (citation omitted). The Eleventh Circuit, sitting *en banc*, has also taken this tack. *See Friends of the Everglades*, 699 F.3d at 1288. It also directly criticized *National Cotton* for expanding subsection (F) to apply to any "regulations relating to permitting itself." *Id.*

The lead opinion distinguishes *Northwest Environmental Advocates* and *Friends of the Everglades*, noting that those cases addressed permitting *exemptions*. But so too did *National Cotton*. In my view, the Ninth and Eleventh Circuit's commentary regarding *National Cotton* and its undergirdings have merit, especially considering subsection (F)'s plain text and the factually narrow circumstances of *Crown Simpson* and *E.I. du Pont*. These same reasons lead me to conclude the lead opinion's reliance on a non-Clean Water Act case to support its policy arguments, *Florida Power & Light Co. v. Lorion*, 470 U.S. 729 (1985), is unavailing.

Taking *National Cotton*'s holding, as I must, there is a better way to reconcile these authorities: Permitting decisions under NPDES and exempting a certain action from the NPDES permitting process are functionally the same because both allow persons to discharge pollutants into the waters of the United States. Such actions, therefore, are reviewable under subsection (F). That is not what we have here. The Clean Water Rule presents neither a permitting exemption (*National Cotton*) nor similar functional equivalency (*Crown Simpson*) that any court has ap-

proved to find jurisdiction proper under subsection (F).

However, *National Cotton* goes further than just finding jurisdiction in cases involving permitting exemptions, and expands jurisdiction to review any regulation "governing" permits. 553 F.3d at 933. Although, in my view, the holding in *National Cotton* is incorrect, this panel is without authority to overrule it. *See Bennett v. MIS Corp.*, 607 F.3d 1076, 1095 (6th Cir. 2010) ("It is a well-established rule in this Circuit that a panel of this court may not overrule a prior published opinion of our court absent en banc review or an intervening and binding change in the state of the law.").[2] Here, the Clean Water Rule defines what waters necessarily require permits, and therefore is undoubtedly a "regulation[] governing the issuance of permits under section 402 [33 U.S.C. § 1342]." *National Cotton*, 553 F.3d at 933. Under this binding authority, the lead opinion properly concludes jurisdiction rests before us under subsection (F).

For these reasons, I concur in the judgment, only.

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[2] That this action is before us upon consolidation by the Judicial Panel on Multidistrict Litigation does not change this result, for we are to apply our law absent an indication that it is "unique" and "arguably divergent from the predominant interpretation of . . . federal law." *In re Cardizem CD Antitrust Litig.*, 332 F.3d 896, 911 n.17 (6th Cir. 2003). Although I disagree with *National Cotton*, I cannot conclude that it is unique and diverges from the predominant view of the other circuits.

IV.

In sum, I am compelled to find jurisdiction is proper pursuant to *National Cotton*. Absent *National Cotton*, I would dismiss the petitions for lack of jurisdiction.

DISSENT

KEITH, *Circuit Judge*, dissenting. I agree with Judge Griffin's reasoning and conclusion that, under the plain meaning of the statute, neither subsection (E) nor subsection (F) of 33 U.S.C. § 1369(b)(1) confers original jurisdiction on the appellate courts. Like Judge Griffin, I disagree with Judge McKeague. Nevertheless, Judge Griffin concludes that original jurisdiction lies in the appellate courts under this court's opinion in *National Cotton Council of Am. v. U.S. EPA*, 553 F.3d 927 (6th Cir. 2009). I believe Judge Griffin's reading of that case is wrong.

In *National Cotton*, this court concluded that it had original jurisdiction to review a rule that created exemptions to the permitting procedures of the Clean Water Act (the "Act"). 553 F.3d at 933. In holding that jurisdiction was proper, the court reasoned that "[t]he jurisdictional grant of [subsection (F)] authorizes the court of appeals 'to review the regulations governing the issuance of permits . . . as well as the issuance or denial of a particular permit.'" *Id.* at 933 (quoting *Am. Mining Cong. v. U.S. EPA*, 965 F.2d 759, 763 (9th Cir. 1992)). Therefore, the court expanded subsection (F) to cover rules that "regulate[] the permitting procedures." *See id.*; *cf.* 33 U.S.C. § 1369(b)(1)(F) (relating to administrative actions

that "issu[e] or deny[] any permit under section 1342"). I view this limited expansion of subsection (F) as the holding of *National Cotton*.

By contrast, Judge Griffin contends that *National Cotton*'s holding expanded the scope of subsection (F) to include anything "relating" to permitting procedures. While *National Cotton* expanded the scope of subsection (F) to cover rules "*regulating*" or "*governing*" permitting procedures, 553 F.3d at 933, it did not expand that subsection to cover all rules "*relating*" to those procedures, such as the one at issue here—a rule that merely defines the scope of the term "waters of the United States." That a rule "relates" to a permitting procedure does not mean that it "regulates" or "governs" that procedure. Therein lies the analytical fallacy in the concurrence. Simply put, it cannot be that any rule that merely "relates" to permitting procedures—however tenuous, minimal, or tangential that relation may be—confers original jurisdiction upon this court under subsection (F). This could not have been the intent of the legislators who drafted seven carefully defined bases for original jurisdiction in the appellate courts—and it could not have been the intent of the *National Cotton* court itself.

Admittedly, the *National Cotton* court could have provided an explanation of what it meant by "regulations governing the issuance of permits." *See* 553 F.3d at 933. By not explaining this phrase, it invited much speculation about the scope of subsection (F). For example, the Eleventh Circuit in *Friends of the Everglades v. EPA*, 699 F.3d 1280, 1288 (11th Cir. 2012), declined to extend the rationale and holding of *National Cotton* because this court failed to provide a better explanation of its reasoning. However, *Na-*

tional Cotton's failure to define this phrase does not mean that this phrase must encompass everything. I am reluctant to read *National Cotton* in a way that expands the jurisdictional reach of subsection (F) in an all-encompassing, limitless fashion.

In sum, *National Cotton*'s holding is not as elastic as the concurrence suggests. If this court construes that holding to be so broad as to cover the facts of this case, that construction brings subsection (F) to its breaking point: a foreseeable consequence of the concurrence's reasoning is that this court would exercise original subject-matter jurisdiction over all things related to the Clean Water Act. Accordingly, I respectfully dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

IN RE: UNITED STATES DEPARTMENT OF DEFENSE AND UNITED STATES ENVIRONMENTAL PROTECTION AGENCY FINAL RULE: CLEAN WATER RULE: DEFINITION OF "WATERS OF THE UNITED STATES," 80 FED. REG. 37,054 (JUNE 29, 2015).

MURRAY ENERGY CORPORATION (15-3751); STATE OF OHIO, ET AL. (15-3799); NATIONAL WILDLIFE FEDERATION (15-3817); NATURAL RESOURCES DEFENSE COUNCIL, INC. (15-3820); STATE OF OKLAHOMA (15-3822); CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, ET AL. (15-3823); STATE OF NORTH DAKOTA, ET AL. (15-3831); WATERKEEPER ALLIANCE INC., ET AL. (15-3837); PUGET SOUNDKEEPER ALLIANCE, ET AL. (15-3839); AMERICAN FARM BUREAU FEDERATION, ET AL. (15-3850); STATE OF TEXAS, ET AL. (15-3853); UTILITY WATER ACT GROUP (15-3858); SOUTHEASTERN LEGAL FOUNDATION, INC., ET AL. (15-3885); STATE OF GEORGIA, ET AL. (15-3887); ONE HUNDRED MILES, ET AL. (15-3948); SOUTHEAST STORMWATER ASSOCIATION, INC., ET AL. (15-4159); MICHIGAN FARM BUREAU (15-4162); WASHINGTON CATTLEMEN'S ASSOCIATION (15-4188); ASSOCIATION OF AMERICAN RAILROADS, ET AL. (15-4211); TEXAS ALLIANCE FOR RESPONSIBLE GROWTH, ENVIRONMENT, AND TRANSPORTATION (15-4234); AMERICAN EXPLORATION & MINING ASSOCIATION (15-4305); ARIZONA MINING ASSOCIATION, ET AL. (15-4404),

Petitioners,

v.

UNITED STATES DEPARTMENT OF DEFENSE, DEPARTMENT OF THE ARMY CORPS OF ENGINEERS AND UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

Respondents.

Nos. 15-3751 /3799/ 3817/
3820/ 3822/ 3823/ 3831/
3837/ 3839/ 3850/ 3853/ 3858/
3885/ 3887/ 3948/4159/ 4162/
4188/ 4211/ 4234/ 4305/ 4404

[Filed February 22, 2016]

Before: KEITH, McKEAGUE, and GRIFFIN, *Circuit Judges*.

JUDGMENT

On Petitions for Review of Final Rule of the United States Department of Defense and United States Environmental Protection Agency. Judicial Panel on Multi-District Litigation, No. 135.

THIS MATTER came before the court upon the petitions for review by Petitioners and Intervenors for review of the Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054 (June 29, 2015).

UPON FULL REVIEW of the record, the motions to dismiss, and arguments of counsel,

IT IS ORDERED, for the reasons more fully set forth in the court's opinions of even date, that all pending motions to dismiss are DENIED.

ENTERED BY ORDER OF THE COURT

/s/
Deborah S. Hunt, Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

IN RE: UNITED STATES DEPARTMENT OF DEFENSE AND UNITED STATES ENVIRONMENTAL PROTECTION AGENCY FINAL RULE: CLEAN WATER RULE: DEFINITION OF "WATERS OF THE UNITED STATES," 80 FED. REG. 37,054 (JUNE 29, 2015).

MURRAY ENERGY CORPORATION (15-3751); STATE OF OHIO, ET AL. (15-3799); NATIONAL WILDLIFE FEDERATION (15-3817); NATURAL RESOURCES DEFENSE COUNCIL, INC. (15-3820); STATE OF OKLAHOMA (15-3822); CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, ET AL. (15-3823); STATE OF NORTH DAKOTA, ET AL. (15-3831); WATERKEEPER ALLIANCE INC., ET AL. (15-3837); PUGET SOUNDKEEPER ALLIANCE, ET AL. (15-3839); AMERICAN FARM BUREAU FEDERATION, ET AL. (15-3850); STATE OF TEXAS, ET AL. (15-3853); UTILITY WATER ACT GROUP (15-3858); SOUTHEASTERN LEGAL FOUNDATION, INC., ET AL. (15-3885); STATE OF GEORGIA, ET AL. (15-3887); ONE HUNDRED MILES, ET AL. (15-3948); SOUTHEAST STORMWATER ASSOCIATION, INC., ET AL. (15-4159); MICHIGAN FARM BUREAU (15-4162); WASHINGTON CATTLEMEN'S ASSOCIATION (15-4188); ASSOCIATION OF AMERICAN RAILROADS, ET AL. (15-4211); TEXAS ALLIANCE FOR RESPONSIBLE GROWTH, ENVIRONMENT, AND TRANSPORTATION (15-4234); AMERICAN EXPLORATION & MINING ASSOCIATION (15-4305); ARIZONA MINING ASSOCIATION, ET AL. (15-4404),

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3885/ 3887/ 3948/ 4159/ 4162/
4188/ 4211/ 4234/ 4305/ 4404

[Filed April 21, 2016]

Before: KEITH, McKEAGUE, and GRIFFIN, *Circuit Judges.*

The court received six petitions for rehearing en banc. The original panel has reviewed the petitions for rehearing and concludes that the issues raised in the petitions were fully considered upon the original submission and decision of the cases. The petitions then were circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petitions are denied. Judge Keith would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

/s/_____
Deborah S. Hunt, Clerk

APPENDIX D

STATUTES INVOLVED

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33 U.S.C. § 1369

§ 1369. Administrative procedure and judicial review

* * * * *

(b) Review of Administrator's actions; selection of court; fees

(1) Review of the Administrator's action (A) in promulgating any standard of performance under section 1316 of this title, (B) in making any determination pursuant to section 1316(b)(1)(C) of this title, (C) in promulgating any effluent standard, prohibition, or pretreatment standard under section 1317 of this title, (D) in making any determination as to a State permit program submitted under section 1342(b) of this title, (E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title, (F) in issuing or denying any permit under section 1342 of this title, and (G) in promulgating any individual control strategy under section 1314(*l*) of this title, may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts business which is directly affected by such action upon application by such person. Any such application shall be made within 120 days from the date of such determination, approval, promulgation, issuance or denial, or after such date only if such application is based solely on grounds which arose after such 120th day.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) of this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement.

* * * * *